No. 04-712

Title:	Lincoln Property Company, et al., Petitioners v. Christopher Roche, et ux.
Docketed:	November 26, 2004
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(03-2064)
Decision Date:	June 30, 2004
Rehearing Denied:	July 27, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 15 2004	Application (04A298) to extend the time to file a petition for a writ of certiorari from October 25, 2004 to November 24, 2004, submitted to The Chief Justice.
Oct 18 2004	Application (04A298) granted by The Chief Justice extending the time to file until November 24, 2004.
Nov 24 2004	Petition for a writ of certiorari filed. (Response due December 27, 2004)
Dec 15 2004	Order extending time to file response to petition to and including January 26, 2005.
Jan 26 2005	Brief amici curiae of Real Estate Roundtable, et al. filed.
Jan 26 2005	Brief of respondents Christopher Roche and Juanita Roche in opposition filed.
Feb 8 2005	Reply of petitioners Lincoln Property Company, et al. filed. (Distributed)
Feb 8 2005	Supplemental brief of respondents Christopher Roche and Juanita Roche filed. (Distributed)
Feb 9 2005	DISTRIBUTED for Conference of February 25, 2005.
Feb 28 2005	Petition GRANTED.
Mar 17 2005	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including May 16, 2005.
May 16 2005	Brief of petitioner Lincoln Property Company, et al. filed.
May 16 2005	Motion for leave to file amici brief filed by Real Estate Roundtable, et al.
May 16 2005	Joint appendix filed.
May 16 2005	Brief amicus curiae of Washington Legal Foundation filed.
Jun 14 2005	Extension of time within which to file respondents' brief on the merits to and including July 20, 2005.
Jul 18 2005	Brief of respondents Christopher Roche and Juanita Roche filed. (Distributed)
Jul 20 2005	CIRCULATED.

Jul 20 2005	SET FOR ARGUMENT on Tuesday, October 11, 2005.
Aug 2 2005	Record received from U.S.C.A. - 4th Circuit. (1 box)
Aug 5 2005	Record received from U.S.D.C. for Eastern District of Virginia. (3 boxes)
Aug 24 2005	Reply of petitioners Lincoln Property Company, et al. filed. (Distributed)
Oct 11 2005	Argued. For petitioners: David C. Frederick, Washington, D.C. For respondents: Gregory P. Joseph, New York, N.Y

Supreme Court, U.S.
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No. 04-____

IN THE
Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 24, 2004

QUESTIONS PRESENTED

1. Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b).

2. Whether a limited partnership's citizenship for diversity subject-matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Lincoln Property Company and State of Wisconsin Investment Board state the following:

Lincoln Property Company is a privately held company. Lincoln Property Company has no parent company, and no publicly held company owns 10% or more of its stock.

The State of Wisconsin Investment Board ("SWIB"), incorrectly sued below as SWIB Investment Company, is an independent agency of the State of Wisconsin and, as such, has no parent companies, subsidiaries, or affiliates for which disclosure is required.

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IN THE

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LINCOLN PROPERTY COMPANY AND
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v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Lincoln Property Company and State of Wisconsin Investment Board respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the district court granting petitioners' motion for summary judgment and denying respondents' motion for summary judgment (Pet. App. 22a-40a), and denying respondents' motion to remand (*id.* at 84a-93a), are unreported. The district court's opinion granting petitioners' motion to exclude the testimony of respondents' medical expert (*id.* at 42a-79a) is reported at 278 F. Supp. 2d 744. The court of appeals' opinion (Pet. App. 1a-19a) is reported at 373 F.3d 610.

JURISDICTION

The court of appeals entered its judgment on June 30, 2004. A petition for rehearing was denied on July 27, 2004. Pet. App. 97a. On October 18, 2004, Chief Justice

Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 24, 2004. *Id.* at 98a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The provisions of 28 U.S.C. §§ 1332, 1441, and 1447, and Federal Rule of Civil Procedure 17, are set forth at Pet. App. 99a-106a.

INTRODUCTION

This case raises issues of longstanding and recurring significance on a fundamental aspect of federal court jurisdiction: how the "citizenship" of parties is determined when federal jurisdiction rests on diversity of citizenship. In this case, the properly named defendants (petitioners here) are concededly diverse and should have been permitted to remove respondents' case to federal court under 28 U.S.C. § 1447. But the court of appeals *sua sponte* ordered a remand to state court. The court determined that another, non-named entity is the "real party in interest" in the litigation and that, notwithstanding respondents' failure to join or substitute that entity as a named defendant, the citizenship of that non-named entity was dispositive in destroying complete diversity between plaintiffs and defendants. The court of appeals further held that the citizenship of that non-named entity – which was a limited partnership – must be determined by its supposedly "very close nexus" to Virginia (a "nexus" ascertained without any fact-finding by the district court), rather than solely on the citizenship of its members.

The Fourth Circuit's first holding deepens an existing conflict among the circuits; the second holding creates a circuit conflict. The Fourth Circuit's errant rulings affect perhaps 5,000 diversity cases in the circuit alone among the approximately 60,000 diversity cases litigated nationwide each year. They also will have a disproportionate impact on thousands of nationwide businesses that operate through limited partnerships and do business in states comprising the Fourth Circuit. This Court's review

is urgently needed to clarify critical jurisdictional rules upon which the business community relies every day.

STATEMENT

This case arises out of lawsuits that respondents Christophe Roche and Juanita Roche filed in state court against petitioners Lincoln Property Company ("Lincoln") and State of Wisconsin Investment Board ("SWIB"), as well as INVESCO Institutional, an entity no longer involved in this litigation.[1] Respondents asserted a plethora of state statutory and common law claims for purported bodily injuries and property damage from exposure to allegedly "toxic levels of mold" at an apartment located in Westfield Village Apartments, a complex owned by SWIB and managed by EQR Lincoln Limited Partnership ("EQR"), a Lincoln affiliate.

Petitioners promptly removed the cases to the United States District Court for the Eastern District of Virginia based on diversity jurisdiction and consolidated them into a single proceeding. The complaints identified respondents as citizens and domiciliaries of Virginia. The complaints named as a defendant Lincoln, which was and is incorporated in Texas with its principal place of business in Dallas, Texas. The complaints also named as a defendant SWIB, which was and is an independent agency of Wisconsin and thus a Wisconsin citizen. As the case comes to this Court, there is no dispute that this action was properly removed by the parties actually named in the lawsuit because it fell within the original diversity jurisdiction of the district court under 28 U.S.C. §§ 1332 and 1441(a). At the time of removal, respondents did not object to removal, seek to have the case remanded to state court, or attempt to join any additional defendants to the suit.

Following petitioners' removal of the case to federal court, the parties engaged in motions practice that

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[1] On November 27, 2002, the district court dismissed INVESCO from this matter. Respondents did not challenge that order.

resulted in a substantial narrowing of respondents' claims. As to the remaining claims – negligence per se (against Lincoln and SWIB) and conversion (against Lincoln only) – petitioners filed a motion for summary judgment. Petitioners also filed a motion under this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), seeking to bar the testimony of Dr. Richard Bernstein, respondents' only medical causation expert.

On April 16, 2003, the district court entered an order notifying the parties that it had granted petitioners' motions in their entirety and that the court would be issuing an order setting forth the reasons for its decision in the near future. Pet. App. 20a-21a. On July 25, 2003, the district court issued its memorandum orders granting petitioners' motions for summary judgment and excluding Dr. Bernstein's testimony. *Id.* at 22a-41a, 42a-81a.

According to respondents, after the April 16, 2003 order, they researched for the first time the propriety of removal. On April 22, 2003, respondents filed a motion seeking to remand the case to state court, asserting that the court lacked diversity jurisdiction because petitioner Lincoln, one of the entities named in the original state court complaint, allegedly was a citizen of Virginia. Respondents argued, based primarily on misconstrued deposition testimony of Lincoln representatives, that Lincoln was not a corporation, but rather a partnership called EQR that had one partner who resided in Virginia.[2]

In response to respondents' motion, petitioner Lincoln submitted a declaration from Lincoln's General Counsel

[2] In their April 22, 2003 motion, respondents relied primarily on the deposition testimony of Lincoln employees Fred Chaney and John LeBeau. Based on respondents' misunderstanding of Chaney's and LeBeau's testimony regarding Lincoln's corporate structure, respondents concluded that the Lincoln entity that they sued was not a Texas corporation, but rather a partnership with one partner who was a Virginia resident. *See* Lincoln/SWIB Opposition to Plaintiffs' Motion to Remand at 6-7 (filed Apr. 30, 2003).

Dan Jacks affirming that Lincoln, the entity sued by respondents, was a Texas corporation with its principal place of business in Texas. *See* Lincoln/SWIB Opposition to Plaintiffs' Motion to Remand at 4-5 & Ex. 1 (filed Apr. 30, 2003). In addition, Lincoln attached to the Jacks declaration its articles of incorporation, which established that Lincoln is a corporation, not a partnership. *See id.*, Ex. 1(A). That evidence thus conclusively established that Lincoln – the only defendant that had been "properly joined and served" under 28 U.S.C. § 1441 and therefore the only relevant entity for purposes of assessing diversity jurisdiction – was in fact diverse.

Moreover, to clarify why respondents' argument concerning EQR was unfounded, Lincoln also submitted evidence establishing that EQR was a limited partnership and that none of EQR's partners – general or limited – was a citizen of Virginia. *See id.*, Ex. 1. The Jacks declaration demonstrated that the general partner of EQR is Lincoln Eastern Management Corporation ("LEMC"), a Texas corporation with its principal place of business in Dallas, Texas, and its limited partner is Lincoln Placeholder Limited Partnership ("LPLP"). *See id.* The Jacks declaration further detailed the citizenship of those entities by attaching partnership and corporate documents establishing that LPLP's general partner is LEMC and its limited partner is Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Dallas, Texas. *See id.*[3] Respondents did not challenge that evidence or the briefing on that issue.[4]

[3] A chart setting forth the relevant Lincoln entities in diagrammatic form is reproduced at Pet. App. 96a.

[4] In their motion for leave to file a supplemental brief, respondents challenged only the fact that they believed that EQR had its "principal place of business" in Virginia. *See* Plaintiffs' Motion for Leave to File Supplemental Brief at 3 (filed June 13, 2003). In determining the citizenship of a partnership, however, the "principal place of business" of the partnership is irrelevant. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 192-93 (1990).

Respondents did, however, subsequently add a new argument to their motion to remand, asserting that the court also lacked jurisdiction over SWIB because it allegedly was an "arm" of the State of Wisconsin.

On August 11, 2003, the district court entered an order denying respondents' motions to remand or for relief from judgment. Pet. App. 84a-93a. The court held that it had diversity jurisdiction over the action because Lincoln, the entity named in respondents' complaints, was a Texas corporation:

> [T]he entity [respondents] identified in their [complaint] filed in state court is Lincoln Property Company, located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas, 72501. This corporation is a Texas corporation with its principal place of business in Texas. Therefore, the entity that [respondents] sued is a Texas corporation.

Id. at 86a-87a (citation omitted). The court also rejected respondents' assertions with respect to EQR: "[E]ven if EQR is the proper defendant in this case (although [respondents] did not sue this entity), EQR is not a citizen of Virginia." *Id.* at 87a. Based on the unrebutted evidence submitted by Lincoln concerning the citizenship of EQR, the district court held that

> EQR is a partnership registered and operating under the laws of Delaware. Furthermore, EQR's partners are: (1) Lincoln Eastern Management Corporation, which is incorporated in Texas and maintains its principal place of business in Texas, and (2) Lincoln Placeholder Limited Partnership, which is a Texas partnership. In addition, Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Texas. Therefore, EQR is a citizen of Texas and no other state; and, even assuming that EQR is the proper defendant, EQR's citizenship is diverse from [respondents].

Id. at 87a-88a (citations omitted).

Respondents appealed. In their arguments to the Fourth Circuit, respondents did not challenge the district court's ruling that Lincoln, the properly named defendant in the action, was diverse. Nor did respondents challenge the district court's subsequent holding that EQR, the nonparty that had been the subject of respondents' speculation, was also diverse. Rather, respondents raised issues on appeal that the Fourth Circuit subsequently did not address and that are not at issue in this Court.[5] Accordingly, in their briefs to the court of appeals, none of the parties presented arguments or evidence concerning the citizenship of Lincoln or any of its affiliates.

Nevertheless, on June 30, 2004, the Fourth Circuit entered a *sua sponte* ruling that petitioner Lincoln had not established diversity jurisdiction with respect to "some Lincoln entity related to this action." *Id.* at 11a. That issue had never been raised by respondents, either before the district court or on appeal. The court perceived its duty to be to ascertain the "real party in interest" on the defendants' side of the case, notwithstanding that respondents had not sued or joined any other defendant. *Id.* at 9a-10a. It then identified the supposed "real party in interest," which it thought was EQR because that entity "receives the management fees for Westfield Village Apartments." *Id.* at 11a-12a (internal quotation marks omitted).

Having identified EQR as the "real" interested defendant, the court of appeals then assumed that Lincoln had failed to disclose EQR's limited partners. *Id.* at 12a. Left

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[5] Specifically, respondents argued that the district court erred in dismissing their claims for breach of the implied warranty of habitability, conversion, and punitive damages. They also claimed that the district court should not have barred the testimony of their purported medical expert and that it should have held that SWIB was an arm of the State of Wisconsin.

with what it perceived to be an evidentiary gap, the court held that Lincoln had failed to meet "its burden of establishing diversity." *Id.* at 13a. It also viewed the evidence as suggesting that EQR was not diverse because it had a "very close nexus" with Virginia. *Id.* at 16a. Rather than remand for fact-finding in the district court on the issue of EQR's citizenship, which the court of appeals had raised *sua sponte* without giving the parties an opportunity for briefing, the Fourth Circuit divested the district court of any meaningful role on remand by ordering this case to be remanded to state court.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit issued two rulings in conflict with other circuits on matters of critical interest to the business community. The first issue is whether a court should examine the "real party in interest" in determining how to assess a defendant's citizenship for diversity purposes. The Fourth Circuit, joined by the Seventh Circuit and one panel of the Ninth Circuit, deepens an acknowledged conflict by holding that a court may look beyond the named defendants in a complaint to determine whether some entity *not named in the complaint* would destroy complete diversity of citizenship, and therefore the basis for federal jurisdiction. A clear majority of circuits, on the other hand, hold that the "real party in interest" analysis applies only to determining a *plaintiff's* citizenship and not a defendant's at all, and that a court does *not* look beyond the named defendants in a complaint to defeat complete diversity. Resolution of that conflict is clearly needed in light of the approximately 60,000 cases filed each year in federal courts that invoke diversity of citizenship as the basis of jurisdiction.

The Fourth Circuit also created a circuit conflict on a second point of special interest to businesses that operate in multiple states: whether a limited partnership's citizenship should be assessed by looking beyond the citizenship of its members to determining whether the partnership has a "very close nexus" (Pet. App. 16a) to the

plaintiff's state of citizenship. In holding that such a "nexus" analysis is compelled, the Fourth Circuit's holding flatly conflicts with those of the First, Second, and D.C. Circuits, which have expressly rejected that very approach in cases involving property development partnerships that operate in multiple states. The Fourth Circuit's erroneous expansion of the "citizenship" concept to include the entity's factual "nexus" to a state has obvious and detrimental consequences to partnerships with nationwide or regional operations that will be deprived of their right to a federal forum because they have a "nexus" with many jurisdictions. Because there are no remaining issues to be resolved prior to relitigating the case in its entirety in state court, this case presents an ideal vehicle for this Court to bring needed clarity to bedrock principles invoked every day in the federal courts.

I. THE FOURTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER THE CITIZENSHIP OF NON-PARTIES IS RELEVANT IN ASSESSING THE DIVERSITY OF DEFENDANTS NAMED IN A LAWSUIT

A. The Citizenship Of Non-Parties As Putative Defendants Is Irrelevant To Determining Whether Diversity Is Present

The court of appeals fundamentally misunderstood the purpose of a "real party in interest" analysis in ordering this case, which had already been fully litigated to a successful outcome for petitioners, to be remanded to state court to begin anew. The removal statute permits a defendant to remove a case brought in state court when the following conditions are satisfied: "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Under well-settled law, the diversity between plaintiffs and defendants must be "complete." *See, e.g., Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806)

(construing predecessor statute to current 28 U.S.C. § 1332).

The statutory requisites of Section 1441(b) are readily satisfied here. Petitioners Lincoln and SWIB are "parties in interest" in the litigation. They were "properly joined and served as defendants." And neither is a "citizen of the State in which such action is brought." Petitioner Lincoln is a Texas corporation with its principal place of business in Dallas, Texas, and SWIB is a citizen of Wisconsin. Respondents are citizens of Virginia. Thus, based on the plain language of Section 1441(b), the court of appeals should have affirmed the district court's ruling that the case was properly removed. The court had no statutory basis for examining the citizenship of any entity that had not been "properly joined and served as [a] defendant[]" in deciding whether removal under Section 1441(b) was proper.

B. The Court's Error Stemmed From A Misunderstanding Of The "Real Party In Interest" Concept

1. Although the Fourth Circuit did not explain the statutory basis for its analysis, the court appears to have taken the words "parties in interest" in Section 1441(b) and conflated that phrase with the concept of "real party in interest," a term used in Federal Rule of Civil Procedure 17(a). In so doing, the court of appeals explicitly based its holding on the citizenship of "some Lincoln entity related to this action," Pet. App. 11a, which the court speculated was the "real party in interest" in the case.

That analysis is deeply flawed. First, it ignores the remaining words in Section 1441(b), which limits the class of "parties in interest" to those that are "properly joined and served as defendants." Under the plain language of Section 1441(b), there was simply no basis for the court to look outside the named defendants in respondents' action to ascertain the citizenship of "some Lincoln entity related to this action." Pet. App. 11a. EQR, the Lincoln affiliate that the Fourth Circuit thought was the "real party in

interest," was never "joined and served as [a] defendant[]" in this lawsuit. Its citizenship is therefore irrelevant to a determination of complete diversity of the defendants that were named in the suit, Lincoln and SWIB.

Second, the court misunderstood how the "real party in interest" concept properly applies. That term is not used to determine whether the defendants are the right parties that may remove an action. Rather, the "real party in interest" analysis in Federal Rule of Civil Procedure 17(a) requires a court to determine that "[e]very action shall be *prosecuted* in the name of the real party in interest." Fed. R. Civ. P. 17(a) (emphasis added). As Professors Wright, Miller, and Kane explain, "[b]y its very nature, Rule 17(a) applies only to those who are asserting a claim." 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543, at 339 (2d ed. 1990). Where a defendant does not assert a counterclaim or third-party claim, as in this case, the "real party in interest" analysis simply is irrelevant in determining the status or citizenship of the named defendants to the lawsuit.

The purpose behind the "real party in interest" analysis is to protect defendants from potentially duplicative liability when sued by a plaintiff that does not actually hold any substantive right to recover. Here, respondents, as masters of their complaint, could choose to sue whomever they wished. They chose to sue Lincoln, the entity whose trade names were used in connection with the management of Westfield Village. Lincoln has an obvious interest in this lawsuit. It has answered and defended the lawsuit and has never even suggested that it would be unwilling or unable to pay any judgment that might be entered against it on the claims asserted in respondents' complaints. Nor is there any other reason artificially to revise the identity of the actual parties to this suit. Respondents' decision to sue a fully diverse corporation was theirs alone. There was no basis in law for the court

below to speculate about the existence of other possible defendants as a basis for destroying complete diversity.

2. The court's error derived from a grave misunderstanding of this Court's cases that have addressed the principle that "the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be *real and substantial parties* to the controversy." Pet. App. 4a (quoting *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980)). This Court in *Navarro Savings*, however, invoked the notion of "real parties to the controversy" (446 U.S. at 461) to determine whether the plaintiff trustees who had invoked diversity jurisdiction under 28 U.S.C. § 1332(a)(1) were the real parties in interest in bringing the lawsuit. In *Navarro Savings*, the defendants sought to defeat complete diversity by asserting that a court must consider the citizenship of the beneficial shareholders of a trust even though they were non-parties who were aligned with the plaintiffs to the complaint. *Id.* at 460. But this Court rejected that argument, stressing that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. The trustees in this case have such powers." *Id.* at 464 (footnote omitted). The Court's holding in *Navarro Savings* thus rested on the unique structure of a trust; the "real party in interest" analysis was used to ascertain the citizenship of *plaintiffs*; the Court looked at the citizenship of third parties to determine whether the fact that they could benefit from the recovery required consideration of their citizenship; and the judgment in fact *upheld* complete diversity. The Fourth Circuit therefore had no basis for concluding that *Navarro Savings* authorizes a court to look outside the complaint and beyond the named defendants to determine whether complete diversity has been destroyed.

In purporting to rest its announced rule on the decisions of "[n]early all federal circuit courts" that supposedly "have applied the 'real party in interest standard' when

determining whether true diversity of citizenship exists," Pet. App. 5a, the court below invoked cases that involve starkly different situations. In *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751-52 (5th Cir. 1996) (cited at Pet. App. 5a), for example, the court addressed the very different situation of when a plaintiff seeks to join a non-diverse defendant in an attempt to defeat complete diversity. The Fifth Circuit held that, if the removing defendant alleges that the plaintiff has "fraudulently joined" that non-diverse defendant, the removing defendant bears the burden of showing that "there is *no possibility* that the plaintiff could state a cause of action against the non-diverse defendants." 99 F.3d at 751-52. That principle has no application here, because respondents never sought – fraudulently or legitimately – to join any non-diverse defendant to their suit.

The Fourth Circuit's invocation (Pet. App. 5a) of *Hughes-Bechtol, Inc. v. West Virginia Board of Regents*, 737 F.2d 540 (6th Cir. 1984), is even farther afield. That case addressed whether a suit against the West Virginia Board of Regents could be removed under diversity jurisdiction. In concluding that the answer was "no," the Sixth Circuit held merely that the Board of Regents was an agency or alter ego of the State of West Virginia and not a "citizen" of the State for diversity purposes. *Id.* at 543-44. That holding provides no support for the Fourth Circuit's conclusion here that Lincoln's citizenship could be disregarded and that the citizenship of a distinct entity with no legal relationship to Lincoln not sued by respondents was *dispositive* in determining complete diversity.[6]

The court's reliance (Pet. App. 5a) on *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), is also misplaced. In that case, the Seventh Circuit held that a

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[6] Nor is *Hughes-Bechtol* relevant to SWIB's status (an issue upon which the Fourth Circuit did not pass), because Wisconsin courts have recognized that SWIB is an "independent going concern." *See Bahr v. State Inv. Bd.*, 521 N.W.2d 152, 186 Wis. 2d 379 (Ct. App. 1994).

suit brought by a state officer in his "official capacity" did not support a finding of diversity jurisdiction because the suit was, in effect, "on behalf of the State of Illinois" and not on behalf of the state officer in his "individual capacity." *Id.* at 250. Thus, none of the cases relied on by the Fourth Circuit – *Sid Richardson*, *Hughes-Bechtol*, or *Nuclear Engineering* – supports the judgment below that a court can look beyond the named defendants in the lawsuit to destroy complete diversity.[7]

Notwithstanding its erroneous reliance on those cases, the court below made abundantly clear that its judgment was not that of a wayward panel. Rather, the court of appeals rested on Fourth Circuit precedent for the notion that diversity jurisdiction may be defeated if a necessary party would destroy diversity. *See* Pet. App. 5a (citing *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998)). Thus, it is now the established rule in the Fourth Circuit that a defendant who removes a case bears the burden of establishing that any potential "real party in interest" not named or joined as a defendant would not in fact destroy complete diversity.

C. The Fourth Circuit's Judgment Deepens An Existing Conflict Among The Circuits On Whether A Non-Named Defendant Is A "Real Party In Interest" For Determining Diversity

1. Two circuits are aligned with the Fourth Circuit's rule that a court is authorized to look outside the actual named parties to the complaint to determine whether complete diversity has been established. In *Indiana Gas Co. v. Home Insurance Co.*, 141 F.3d 314 (7th Cir. 1998),

[7] The other case on which the court below relied, *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302 (9th Cir. 1987) (cited at Pet. App. 5a), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991), arguably *does* support the Fourth Circuit's judgment here. We address that case in more detail below, where we highlight the deep confusion among the courts of appeals in determining the circumstances when complete diversity may be destroyed by a non-named defendant to the lawsuit. *See* pp. 20-21, *infra*.

the Seventh Circuit engaged in a virtually identical analysis. In that case, an insured gas company appealed from a judgment in favor of various insurers, including Lloyd's underwriting syndicates. Without prior notice to the parties, the court undertook to determine *sua sponte* whether complete diversity had been satisfied by inquiring into the citizenship of the "names" in a Lloyd's underwriting syndicate even though they were not named parties to the suit. *Id.* at 315-16. As Judge Evans' dissent makes clear, that analysis came as a complete "surprise" and was held to control the case "despite the fact that the complaint alleged an arguable basis for diversity jurisdiction, the answers conceded jurisdiction, the district judge nurtured the case for three years and the parties came here looking for answers to questions on the merits of this complex litigation." *Id.* at 320 (Evans, J., dissenting).

The approach of the Fourth, Seventh, and arguably the Ninth Circuits,[8] therefore, is that courts can look beyond the named defendants to determine whether complete diversity exists. As we now demonstrate, that rule has been rejected in a clear majority of the other circuits.

2. Notwithstanding the holdings of those circuits, the Second, Third, Fifth, Sixth, Eighth, and Tenth Circuits have recognized that the "real party in interest" concept applies only to determining whether the party bringing the claim has a right to seek relief or that a court should not look outside the complaint to decide that putative non-named defendants would destroy complete diversity. The Fifth and Sixth Circuits have explicitly rejected both underpinnings of the Fourth Circuit's erroneous judgment here. The conflict is thus mature and deep, and in need of immediate resolution.

In a decision that sets forth the proper analysis in a manner directly in conflict with the Fourth Circuit here, the Sixth Circuit has explained that "[t]he real party in interest analysis turns upon whether the substantive law

[8] *See* p. 20, *infra*.

creating the right being sued upon affords the party bringing the suit a substantive right to relief." *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 43 (6th Cir. 1994). Thus, the "real party in interest is the person who is entitled to enforce the right asserted under the governing substantive law," *i.e.*, the plaintiff or counterclaim defendant. *Id.* at 42-43.[9] The Sixth Circuit further applied that analysis in *Layne* to hold that, because the defendants' counterclaim named only the underwriters of insurance, and not the syndicates, the defendants' decision to name the underwriters "seems to be a clear election to sue" certain parties and not others. *Id.* at 43-44. Because the counterclaim named parties that "are completely diverse," jurisdiction under Section 1332(a)(2) "was properly invoked." *Id.* at 44.

The Fifth Circuit has likewise held that "[t]he real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990). More recently, that court has reaffirmed that the fact that business entities are structured "such that the other [entity is] affected by the judgment against [the defendant] does not bring [that] other part[y] before the court *or make [it] relevant* for the citizenship determination." *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 864 (5th Cir. 2003) (emphasis added), *cert. denied*, 124 S. Ct. 2421 (2004). Indeed, "[t]he 'real party to the controversy' test does not require a federal court to consider the citizenship of non-parties who have an interest in the litigation or might be affected by the judgment." *Id.* at 865 n.10. Yet here the Fourth Circuit not only considered the citizenship of such a non-party; it actively sought out that

[9] In *Indiana Gas*, the Seventh Circuit explicitly recognized that its holding conflicted with the Sixth Circuit's in *Layne*. *See* 141 F.3d at 319 ("[w]e disagree with *Layne*"); *id.* at 320 (Evans, J., dissenting) (noting that the majority's treatment of *Layne* "creat[es] a conflict among the circuits"). That conflict has only deepened. *See* pp. 17-18, *infra*.

non-party to create a basis for declaring *sua sponte* that diversity jurisdiction was improper.[10]

Other circuits agree with that position and hold that a court must assess the "real party in interest" only to determine whether a *claimant* is the proper party to pursue a cause of action – and *not* to judge whether a non-named party defendant would destroy complete diversity. *See, e.g., Esposito v. United States*, 368 F.3d 1271, 1273 (10th Cir. 2004) (decedent's right to sue passed to "real party in interest [who] is determined by referring to the governing substantive law"); *Consul General v. Bill's Rentals, Inc.*, 330 F.3d 1041, 1045 (8th Cir. 2003) ("The real party in interest is a party who, under governing substantive law, possesses the rights to be enforced.").

In correctly limiting the "real party in interest" analysis to assessing the plaintiff's citizenship, other circuits have held that complete diversity may not be destroyed by a plaintiff seeking to invoke the citizenship of non-parties whose interests are aligned with the named defendants. As the master of its complaint, the plaintiff can sue such potential defendants (unless to do so would violate the rule against fraudulent joinder). Thus, in direct conflict with the Seventh Circuit's approach in *Indiana Gas* – and now the decision below – the Second, Third, and Fifth Circuits adhere to the approach adopted by the Sixth Circuit in *Layne*, 26 F.3d at 43-44 (holding that plaintiffs' election to sue underwriters as named defendants precluded any need to assess citizenship of any other entities in determining citizenship under diversity jurisdiction). *See*

[10] This Court has previously acknowledged that, once a case has been litigated to conclusion in federal district court, the judgment on the merits should not be disturbed absent good reason for doing so. For example, in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), the Court reversed a decision of the Fifth Circuit that had ordered a fully litigated case dismissed because of defects in removal, and instructed that following a decision on the merits "in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75 (parallel citations omitted).

E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 939 (2d Cir. 1998) (holding that, when an underwriter is properly sued only in an individual capacity, the relevant citizenship is that of the underwriter alone and court does not look beyond the named defendants in the complaint to destroy complete diversity); *Corfield*, 355 F.3d at 863 (expressly agreeing with *Squibb*'s reasoning); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 223 & n.16 (3d Cir. 1999) (allowing suit to proceed against just one Lloyd's underwriter and "perceiv[ing] no reason why Chemical Leaman should not be entitled to sue less than all of the names if it so chooses"). In *Indiana Gas*, by contrast, the Seventh Circuit held that the citizenship of all names in an underwriting syndicate must be taken into account in determining the propriety of diversity jurisdiction. 141 F.3d at 319.

The majority of the circuits thus agree that the "real party in interest" inquiry is intended to stop plaintiffs from including non-diverse co-plaintiffs who have no interest in the outcome of the lawsuit, but who are included solely for the purpose of destroying complete diversity. *See, e.g., Iowa Pub. Serv. Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977) ("[I]f the 'nondiverse' plaintiff is not a real party in interest, and is purely a formal or nominal party, his or its presence in the case may be ignored in determining jurisdiction.") (citing *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182 (1924)).[11] That purpose, of course, is not implicated here, because Lincoln has never contested that it is a properly named defendant; Lincoln's objection to the suit is that it has no substantive merit.

In the decision below, the Fourth Circuit clearly aligned itself with the Seventh Circuit's approach. A clear majority of circuits, however, have all acknowledged that a

[11] As the court further explained, a plaintiff's effort to sue a non-diverse defendant that has no interest in the outcome of the dispute is handled under the concept of "fraudulent joinder." 556 F.2d at 404 & n.4.

plaintiff can properly choose to sue a particular defendant without also enmeshing all other entities that may be associated, contractually or otherwise, with that defendant. However, the Fourth and Seventh Circuits functionally treat groups of related entities as one potential defendant, such that, if one of those companies is sued, the citizenship of related entities will be assessed to determine whether the "real party in interest" is completely diverse from the plaintiffs. And if that unnamed, related entity happens to be of non-diverse citizenship, diversity will be destroyed. In that way, the Fourth Circuit (as did the Seventh Circuit) makes the citizenship of a group of related entities turn upon the citizenships of each, rather than the citizenship of the entity actually sued. The Court should grant certiorari to correct this erroneous view, and confirm the proper rule applied by a majority of the circuits.

D. The Ninth Circuit's Divergent Approaches Both Support And Reject The Fourth Circuit's Rule

In cases cited by the court below, albeit without any acknowledgment that they point in opposite directions, the Ninth Circuit has issued judgments that both support and reject the Fourth Circuit's approach, thus signaling that the confusion among the courts of appeals is both real and in need of this Court's clarification. As then-Judge Kennedy explained, "[t]he real party in interest concept is correctly applied *only* to those persons prosecuting an action, not to a defendant." *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171, 1173 n.2 (9th Cir. 1979) (Kennedy, J.) (emphasis added). *See also Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1095 (9th Cir. 2003) (dismissing case for lack of subject-matter jurisdiction when non-diverse insured, rather than diverse insurance company, was proper plaintiff as the real party in interest).

In *Simpson*, the Ninth Circuit found that diversity jurisdiction was proper because, as here, the plaintiff had "chose[n] to sue the Rhode Island parent corporation"

rather than another, non-diverse affiliate. 608 F.2d at 1173. Thus, because "the parties are diverse and the amount-in-controversy requirement is satisfied, our only inquiry is whether this jurisdiction must be disregarded because the diversity is improper or collusive." *Id.* As a result of the fact that a "plaintiff ordinarily is free to decide who shall be parties to his lawsuit," *id.* at 1174, diversity jurisdiction was proper in *Simpson* even though the diverse parent corporation had a non-diverse subsidiary that arguably *could have* been named as a proper defendant in the case. The Fourth Circuit's analysis of the "real party in interest" issue therefore plainly conflicts with that employed by the Ninth Circuit in *Simpson*.

That said, a different Ninth Circuit decision also cited by the court below might be read as supporting the Fourth Circuit's rule. *See Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group*, 823 F.2d 302 (9th Cir. 1987) (cited at Pet. App. 5a), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991). In *Rockwell International*, the Ninth Circuit *sua sponte* raised the issue of complete diversity after appeal of a judgment that had been entered in favor of an insurance defendant, USAIG. USAIG had removed the case from state court in Arizona, on the ground that the issuer of the insurance (Aetna Casualty and Surety Company) was a Connecticut citizen that had not been named as a defendant. 823 F.2d at 303. In holding that removal was improper because complete diversity had not been established, the Ninth Circuit in *Rockwell International* adopted reasoning on all fours with that of the court below: because USAIG "is a group of independent insurance companies," and because USAIG had not demonstrated that "one of the USAIG group is *not* a Delaware corporation" (where the plaintiff Rockwell was a corporate citizen), USAIG could not meet its "burden of establishing diversity." *Id.* at 304 (emphasis added).

Thus, in the Fourth and Seventh Circuits – and under one decision of the Ninth Circuit – a corporation must

prove a negative to withstand a challenge to federal diversity jurisdiction: that one of its non-named affiliated entities is *not* the "real party in interest" whose presence would destroy complete diversity. In a majority of circuits, a court would not conduct a "real party in interest" analysis at all with respect to defendants in deciding whether some non-named entity should have been sued as a defendant, and correspondingly would not permit the citizenship of non-named entities to defeat jurisdiction.

E. The Issue Is Of Surpassing Importance To The Business Community As It Creates Massive Uncertainty Over Whether Non-Named Affiliates Will Destroy Diversity Jurisdiction

Resolution of the deep circuit conflict by this Court is critically important to the business community. A huge number of diversity cases are filed each year in the federal courts. In 2003, for example, 61,656 diversity cases were commenced in the federal courts – roughly 30% of all private civil cases filed in the federal courts that year. Given that approximately 8.5% of all civil cases each year are litigated in the Fourth Circuit, as many as 5,000 diversity cases filed each year are potentially affected by the decision below.

In each of those thousands of cases, entities such as corporations or limited partnerships that are parties to the suit will be subject to major uncertainties with respect to jurisdiction. In many cases, as here, a group of affiliated entities is doing business utilizing one or more such business organizations. Should the Fourth Circuit's rule stand, companies with the kinds of routine structures utilized by Lincoln and EQR will face the prospect of being sent to state court, and perhaps even having a final judgment in federal court vacated because of the belated "discovery" of a non-diverse affiliate that a plaintiff then asserts was the proper defendant (or perhaps even only *a* proper defendant) in the first place. In those diversity cases, the clear and certain rule followed by courts that understand the role of the "real party in interest" rule –

that the only relevant parties for purposes of diversity jurisdiction are those that have actually been named in the pleadings – will be replaced by uncertainty as to exactly which affiliated entities may someday be declared to be the "real party in interest."

II. THE FOURTH CIRCUIT'S JUDGMENT CREATES A CONFLICT OVER WHETHER THE CITIZENSHIP OF A LIMITED PARTNERSHIP IS DETERMINED THROUGH ANALYSIS OF WHETHER IT HAS A "VERY CLOSE NEXUS" WITH THE STATE

Even if it was proper to consider EQR at all – a non-named limited partnership that respondents never joined to the suit despite having had every opportunity to do so – the Fourth Circuit committed a second error that creates a conflict among the courts of appeals on an issue of great significance: whether a limited partnership's citizenship is to be determined for diversity purposes not by the citizenship of its partners, but by whether the partnership's activities create a "very close nexus" with the state. Pet. App. 16a. The Fourth Circuit's minority approach has substantial ramifications for the business community.

A. The Court Of Appeals Erred In Taking Into Account Limited Partnership EQR's "Nexus" Of Activities In Addition To The Citizenship Of Its Partners

In *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), this Court held that a court must look to the citizenship of each of the partners in a limited partnership, both limited and general, in determining whether complete diversity exists. *Id.* at 195. The Court "reject[ed] the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members." *Id.* Nowhere did the Court suggest that a court may look beyond the entity's membership and assess the nature of the entity's activities in a state in determining its citizenship.

Indeed, such a requirement is completely illogical and contrary to the notion of an entity's citizenship, which is the statutory concept that must be applied. Section 1332(a)(1) expressly provides that diversity jurisdiction is only available for "citizens of different States." 28 U.S.C. § 1332(a)(1). A corporation establishes its "citizenship" in a state by filing its articles of incorporation with the Secretary of State. *Id.* § 1332(c)(1).

In *Carden*, this Court stressed that the citizenship of a limited partnership is not treated the same way as a corporation. Rather, the citizenship of a limited partnership must be judged by the citizenship of its members and not just by the general partner that controls the limited partnership's activities. 494 U.S. at 195. In looking beyond the citizenship of EQR's general partner and limited partner, which are not Virginia citizens, the Fourth Circuit below went well beyond the requisites laid out in *Carden* and concocted out of whole cloth an additional "nexus" factor not found in any of this Court's decisions.

B. The Fourth Circuit's Judgment Creates A Conflict Among The Circuits Over The Proper Understanding Of *Carden*

In the aftermath of *Carden*, the courts of appeals have reached conflicting judgments on how to assess the citizenship of artificial entities such as limited partnerships. This case presents an ideal vehicle for resolving that circuit conflict.

Other circuits that have confronted the issue presented here have come to a diametrically opposite conclusion from the Fourth Circuit's. In *ConnTech Development Co. v. University of Connecticut Education Properties, Inc.*, 102 F.3d 677, 681 (2d Cir. 1996), for example, the Second Circuit expressly rejected the very position adopted by the Fourth Circuit below. Like EQR here, in *ConnTech* a property developer was organized as a partnership "composed of corporate citizens of New Jersey and Ohio." *Id.* The defendant, a Connecticut corporation, challenged complete diversity on the ground that the developer

"should be deemed a citizen of Connecticut because [it] was established 'for the sole purpose of acting as master developer pursuant to the [Master Development Agreement]' and because [it] 'acted wholly within Connecticut.'" *Id.* The Second Circuit found those arguments to be insufficient as a basis for ignoring the actual citizenship of the property developer's partners: "[a]s no ConnTech partner is a citizen of Connecticut, ConnTech is a diverse party." *Id.*

Likewise, in *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993), the First Circuit held that a property development partnership was not a citizen of Puerto Rico, notwithstanding the fact that it was doing substantial business there and that business led to the dispute at issue in the litigation. Instead, the court held that the partnership's citizenship depended on the citizenship of its partners, which were corporations incorporated in New York and with their principal place of business in New York. *Id.* at 63-64. The court rejected the argument – adopted by the Fourth Circuit below – that a corporate partner's "principal place of business" becomes the state where the partnership is engaging in the business activities giving rise to the litigation. *Id.* at 63 (describing the "sole corporate 'activities'" of the two corporate partners as holding or administering their assets in the New York partnership that was doing business in Puerto Rico and holding those activities to be insufficient to destroy complete diversity in a suit with a Puerto Rico construction company). On the facts here, EQR's partners – LEMC and LPLP – are in a precisely analogous position to the corporate partners in *Taber Partners*. The D.C. Circuit has also adopted this position.[12]

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[12] *See Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 357 n.1 (D.C. Cir. 1983) (per curiam) ("[f]or diversity purposes, the citizenship of a limited partnership does not depend upon the state of its organization, the location of its principal place of business, or any of its other features as an entity").

The First, Second, and D.C. Circuits, therefore, have squarely rejected the significance of any supposed "very close nexus" to a state in determining the citizenship of an entity such as a limited partnership, and all three circuits have done so in the context of determining a property developer's citizenship. The Fourth Circuit's contrary determination unacceptably deviates from both this Court's precedent and the practice of other courts of appeals, and should be rejected.

C. Correcting The Fourth Circuit's Flawed Methodology Is Important To Companies And Partnerships That Operate On A Regional And Nationwide Basis

The question presented by this case is of the utmost importance to the many national and multinational businesses in this country that operate through various subsidiaries, partnerships, or limited partnerships. Under the Fourth Circuit's logic, an unsuccessful plaintiff in federal court has every incentive to scour corporate and partnership records to point to some related, alternative entity that he or she could have sued – but did not actually sue. Indeed, the Fourth Circuit goes so far as to hold that "the citizenship of the nominal parties listed on the Complaint," *i.e.*, the entities that were actually sued, "is in no way dispositive of a subject matter jurisdiction challenge." Pet. App. 17a. Instead, the court of appeals holds that a removing defendant "ha[s] the burden" of placing into the record "sufficient indicia – by a preponderance of the evidence – that one member" of the "group of companies doing business in Virginia is not a citizen of the Commonwealth." *Id.* Moreover, the Fourth Circuit demands that removing defendants provide "evidence as to how" entities legally separate from the named defendant and that were not sued "are distinct or uninvolved in" the named defendant's "business enterprises" and "property holdings" in the Commonwealth of Virginia. *Id.* at 11a. That heavy burden would effectively slam shut the doors of the federal courts to companies, like property develop-

ment and management companies, that do business in multiple states or that partner with local entities to carry out individual projects.

The Fourth Circuit's opinion also rewards sandbagging by permitting a search for jurisdictional spoilers not named in the complaint itself and by placing the heavy burden of proving that such putative defendants are diverse through the presentation of factual material to the court of appeals in the first instance. It thereby gives plaintiffs in the tens of thousands of diversity cases filed in the federal courts each year a second bite at the apple in state court whenever they lose on the merits, so long as they can conjure up an alternative defendant that a court of appeals might be persuaded to accept. The Fourth Circuit's decision here to overturn a final judgment on the merits and force the parties to relitigate the case in state court is a particularly pernicious application of its wayward jurisdictional precepts. Permitting such litigation gamesmanship undercuts important principles of finality, deprives litigants of their right to a federal forum, and threatens to strip district courts of their important role in deciding disputes between citizens of different states.

CONCLUSION

The petition for a writ of certiorari should be granted.

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November 24, 2004

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2064

CHRISTOPHER ROCHE; JUANITA ROCHE,
Plaintiffs-Appellants,

v.

LINCOLN PROPERTY COMPANY;
SWIB INVESTMENT COMPANY,
Defendants-Appellees,

AND

INVESCO INSTITUTIONAL,
Defendant.

[Decided June 30, 2004]

Before WIDENER and GREGORY, Circuit Judges, and C. ARLEN BEAM, Senior Circuit Judge of the United States Court of [Appeals for the Eighth Circuit].

GREGORY, Circuit Judge:

Plaintiffs discovered evidence of toxic mold in their Fairfax County, Virginia apartment. They notified the property management office in Virginia and an inspection was ordered, mold was found, and abatement was required. During the mold remediation process Plaintiffs were relocated and their personal belongings were left in the care of the property management firm and the mold treatment firm. After treatment had been completed, Plaintiffs determined that certain of their valuables had been misplaced or stolen. They also learned from their treating physician that the mold had caused and exacerbated certain medical conditions. Plaintiffs brought suit in state court alleging breach of implied warranty of

habitability, negligence, conversion and violations of Virginia's landlord-tenant act. Defendants removed the matter to federal court relying on diversity of citizenship. In support of removal, Defendants contended that the Texas parent corporation named in the state complaint created diversity of citizenship. Plaintiffs contended that there was not complete diversity because the property was managed by a Virginia subsidiary of the Texas parent. The district court denied Plaintiff's motion to remand for lack of diversity jurisdiction and granted summary judgment for the defendants. Plaintiffs now appeal the jurisdictional issues and summary judgment. We conclude that Defendants failed to carry their burden of proof with respect to their allegedly diverse citizenship. The judgment of the district court is therefore reversed as to jurisdiction, the remainder is vacated, and this case is remanded with instructions to remand to state court pursuant to 28 U.S.C. § 1447(c).

I.

On August 22, 2002, Plaintiffs Christopher and Juanita Roche (the "Roches" or "Plaintiffs") filed a Motion for Judgment against Lincoln Property Company ("Lincoln"), the State of Wisconsin Investment Board ("SWIB"), and Invesco Institutional ("Invesco") in the Virginia Circuit Court for Fairfax County, claiming personal injury and property damage sustained as a result of their exposure to toxic molds at the Westfield apartments. The Motion for Judgment named as defendants: "Lincoln Property Company t/a Lincoln Property Company ECW, Inc.," "INVESCO Institutional (N/A Inc.) Institutional Division of AMVESCAP a/k/a Invesco Realty Advisors," and "SWIB Investment Company State of Wisconsin Investment Board Lincoln Property Company." On September 17, 2003, Defendants filed a Notice of Removal pursuant to 28 U.S.C. § 1441, on the basis of diversity of citizenship. Defendants then filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which was granted with leave for Plaintiffs to file an amended

complaint. Plaintiffs amended their complaint and a jury trial was scheduled for May 3, 2002.

On April 22, 2003, Plaintiffs filed a Motion to Remand challenging diversity with respect to Lincoln. The motion was later expanded to include an additional claim of lack of subject matter jurisdiction on the basis that defendant SWIB was an arm of the State of Wisconsin and, therefore, not a citizen for diversity purposes. On May 2, 2003, the Plaintiffs filed a Rule 60(b) motion for relief from an order or judgment that is void for lack of jurisdiction.

On July 11, 2003, the district court denied Plaintiffs' motions to remand and for relief. On August 21, 2003, Plaintiffs filed their Notice of Appeal. On September 3, 2003, the district court denied Plaintiffs' motion for reconsideration.

II.

We review a denial of a motion to remand to state court *de novo*. *See Mayes v. Rapoport*, 198 F.3d 457, 460 (4th Cir.1999) (citing *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 384, 4 S.Ct. 510, 28 L.Ed. 462 (1884); *Tillman v. Resolution Trust Corp.*, 37 F.3d 1032, 1034 (4th Cir.1994) (reviewing *de novo* denial of motion to dismiss for lack of subject matter jurisdiction); *see also Burden v. General Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir.1995) (reviewing *de novo* denial of motion to remand)).

Federal courts have jurisdiction over controversies between "Citizens of different States" by virtue of 28 U.S.C. § 1332(a)(1) and U.S. Const., Art. III, § 2. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980).[1] Early in its history, the Supreme Court

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[1] In *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806), the Supreme Court concluded that the precursor to 28 U.S.C. § 1332(a)(1) required that "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts." *Id.* As the Supreme Court later noted, however, the requirement of complete diversity is derived from "the words of the act of Congress," and not the Constitution. *State Farm Fire & Cas. Co. v.*

"established that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be **real and substantial parties** to the controversy." *Id.* at 460-61, 100 S.Ct. 1779 (quotations and citations omitted) (emphasis added). "Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of **real parties to the controversy**." *Id.* (citations omitted) (emphasis added).

The early cases held that only "persons" could be real parties to the controversy. Artificial or "invisible" legal creatures were not citizens of any State. *Id.* (citing *Bank of United States v. Deveaux*, 5 Cranch 61, 86-87, 91, 3 L. Ed. 38 (1809)).[2] Corporations suing in diversity, however,

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Tashire, 386 U.S. 523, 531, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967). Article III of the Constitution requires only minimal diversity. *Id.*; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 n. 18, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). However, it is axiomatic that the jurisdiction of the inferior courts – meaning the court of appeals and the district court – is determined by Congress. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60, 67, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion) (Brennan, J.); *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372 (1855); *see also Yang v. INS*, 109 F.3d 1185, 1197 (7th Cir.1997) (Easterbrook, J.) ("The power to establish the inferior federal courts under Article III § 1 permits Congress to determine their jurisdiction."). Thus, we must exercise our jurisdiction in a manner that is strictly consistent with the plain language of the removal statute and congressional intent.

[2] The *Navarro* Court noted:

> Although overruled in *Louisville, C., & C.R. Co. v. Letson*, 2 How. 497, 2 How. 497, 43 U.S. 497, 11 L.Ed. 353 (1844), *Deveaux* was resurrected by *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 14 L.Ed. 953 (1854). *Marshall* held that an artificial entity cannot be a citizen, but that the persons who "act under [corporate] faculties . . . and use [the] corporate name" are presumed to reside in the State of incorporation. *Id.*, at 328; *see St. Louis & S.F.R. Co. v. James*, 161 U.S. 545, 562, 16 S.Ct. 621, 40 L.Ed. 802 (1896). This view endured until 1958, when Congress amended the diversity statute to provide explicitly that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Act of July 25, 1958, § 2, 72 Stat. 415 (codified at 28 U.S.C. § 1332(c)).

Navarro, 446 U.S. at 461 n. 7, 100 S.Ct. 1779.

have long been "deemed" citizens in modern jurisprudence. *See id.*[3] The "real and substantial party in interest standard," however, applies nonetheless. *Id.* Nearly all federal circuit courts have applied the "real party in interest standard" when determining whether true diversity of citizenship exists. *See e.g., Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 752-53 (5th Cir.1996) (applying real party in interest standard on review of motion to remand for lack of diversity); *Rockwell Int'l Credit Corp. v. U.S. Aircraft Ins. Group*, 823 F.2d 302 (9th Cir.1987) (same), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991); *Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents*, 737 F.2d 540, 543-44 (6th Cir.1984) (same); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir.1981) (same and noting that real party in interest is to be determined by "essential nature and effect of the proceeding").

Moreover, this Court has also applied the "real and substantial party in interest" standard when determining the propriety of exercising diversity jurisdiction. *See, e.g., Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir.1998) (citing *Navarro*, 446 U.S. at 460-61, 100 S.Ct. 1779 *and Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) (observing that the corporation, not the shareholder, is the real party in interest in a shareholder's derivative suit)); *see also* authorities cited in note 4, *infra*, (applying real party in interest standard to determine whether assignments were collusive to obtain or destroy diversity jurisdiction). And, it is firmly settled that a corporate parent and its subsidiaries may not manipulate federal diversity jurisdiction by litigating cases in the name of the other where the real party in interest is not diverse. *See Simpson v. Alaska State Comm'n for Human Rights*, 608 F.2d 1171, 1174 (9th Cir.1979) ("We acknowledge that assignments of Causes of action

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[3] Under 28 U.S.C. § 1332(c) a corporation is deemed a citizen of its state of incorporation and of the state where it has its principal place of business.

between parents and subsidiaries are presumptively ineffective to create diversity jurisdiction.") (citing *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 475 (2d Cir.1976) *and Green & White Constr. Co. v. Cormat Constr. Co.*, 361 F.Supp. 125, 127-28 (N.D.Ill.1973)).[4]

Thus, in diversity cases, the general rule is that the citizenship of the real parties in interest is determinative for purposes of diversity jurisdiction. The citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism. It is based upon the principle that a primarily local controversy should be tried in the appropriate state forum and that nominal or formal parties, who do not have a significant interest in the outcome of the litigation, should not be able to use the federal courts. *See* C. Wright & A. Miller, 6A Federal Practice & Procedure Civ.2d § 1556, at 419-22 (West 2004). Diversity of citizenship, therefore, is determined not by reference to the formal or nominal parties but, rather, there must be complete diversity between the real and substantial parties in interest. *See* 28 U.S.C. § 1332(a); *see also Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 (5th Cir.1990) (observing that removal jurisdiction is

[4] *See also, e.g., Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 642, 646 (1st Cir.1995) (merger of corporation into another corporate shell ineffective to create diversity jurisdiction); *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 859, 861-62 (2d Cir.1995) (twenty-nine air carriers "real and substantial parties" because collection agency was "mere conduit for a remedy owing to others"); *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991, 993 (9th Cir.1994) (assignment by wholly-owned corporate subsidiary of its rights to parent corporation ineffective to create diversity jurisdiction); *Yokeno v. Mafnas*, 973 F.2d 803, 809-11 (9th Cir.1992) (for real party in interest determination, assignment between corporation and director presumptively collusive and on remand could only be overcome with proof of legitimate business reason and consideration of several other factors); *J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd.*, 331 F.Supp. 1215, 1220, 1222 (W.D.Mo.1971) (whether assignment by wholly owned corporate subsidiary, who was real party in interest, of its rights to parent corporation was collusive presented "very close question of fact and law"; claim dismissed on *forum non conveniens* ground), *aff'd*, 462 F.2d 998 (8th Cir.1972).

"based on the citizenship of the real parties in interest rather than their appointed representatives" or nominal parties). *But cf. Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 252 (5th Cir.1973) ("The citizenship of one who has an interest in the lawsuit but who has not been made a party to the lawsuit by plaintiff cannot be used by plaintiff on a motion to remand to defeat diversity jurisdiction.").[5]

III.

Congress has resolved that, "[i]f at any time before final judgment it appears that the district court lacked subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). And, it is well-settled that courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 85 L.Ed. 1214 (1941); *Dixon v. Coburg Dairy*, 369 F.3d 811 (4th Cir.2004) (*en banc*) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated. Therefore, '[i]f federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (citations omitted). Likewise, it is equally well-settled that the parties' characterization

[5] The Court of Appeals for the Fifth Circuit relied upon *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968) and *Saint Paul Mercury Indemn. Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938). Both of those cases dealt with the joinder (or failure to join) an insurance company who had, at best, a tangential interest in the pending claim. Applying Fed.R.Civ.P. 19, the Supreme Court concluded in *Provident* that the citizenship of the insurer was not to be considered for diversity purposes because, under Rule 19, it was not a necessary and indispensable party – the insurer was only obligated to pay the claim up to policy limits and its absence did not affect the substantial rights of the parties. In this case, however, the Roches contend that Lincoln's Virginia entity is the real and substantial party in interest, without whom they cannot be made whole. And, Lincoln has been made a party to the lawsuit.

of themselves or their claims is not determinative for federal jurisdiction purposes. *Id.* at 140.[6]

The Roches moved for remand arguing that the district court lacked subject matter jurisdiction insofar as Defendant Lincoln is not a Texas corporation, but rather is not a corporation at all and, instead, is a partnership with a partner who is a Virginia resident. J.A. at 1973.[7] According to the district court, the Roches based their motion for remand on the following uncontroverted[8] evidence:

> (1) the deposition of Fred E. Chaney, Lincoln's Rule 30(b)(6) designee, who allegedly stated that **Lincoln was a partnership and not a company**;
>
> (2) the deposition of John LeBeau, vice president of the Mid-Atlantic Regional Division of Lincoln, who identified **Jeff Franzen as a Senior Vice President, and "partner," in Lincoln Property Company**;
>
> (3) Lincoln's corporate website identifying **Jeff Fransen as a "partner"**;
>
> (4) certificates from the Virginia State Corporation Commission certifying that Lincoln Property Company is neither authorized nor registered to conduct business in Virginia, and certifying that **EQR/Lincoln Limited Partnership is an authorized and registered "partnership" in Virginia**; and

[6] As the *Sheets* Court noted, "decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions." 313 U.S. at 140, 61 S.Ct. 888 (citing *Mason City & Ft. Dodge Ry. Co. v. Boynton*, 204 U.S. 570, 27 S.Ct. 321, 51 L.Ed. 629 (1907)). And, as the Supreme Court noted in *Carden v. Arkoma Assocs.*, "the nature of the named party does not settle the question of who are the real parties to the controversy" for jurisdictional purposes. 494 U.S. 185, 204, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990) (citing *Navarro*, 446 U.S. at 464-66, 100 S.Ct. 1779).

[7] Plaintiffs also contended that Lincoln misrepresented its state of citizenship in the Notice of Removal.

[8] Other than the district court's own analysis, the court cited no contrary evidence offered by Defendants.

> (5) the Fairfax County Tax Assessment Office records demonstrating that **Jeff Franzen is a resident of Fairfax County, Virginia**.

J.A. at 1974 (emphasis added).

If diversity jurisdiction is challenged, the burden of proof remains on the party invoking federal court jurisdiction, and the citizenship of each real party in interest must be established by a preponderance of the evidence. *Mas v. Perry*, 489 F.2d 1396 (5th Cir.1974); *Janzen v. Goos*, 302 F.2d 421 (8th Cir.1962). If this burden is not met, the federal court must dismiss the action. *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890 (4th Cir. 1972); *see also* Fed.R.Civ.P. 12(h)(3). A party's mere allegation of diversity cannot satisfy its burden of establishing the district court's jurisdiction. "In a properly pleaded diversity action between corporations the plaintiff will not only allege that there is diversity of citizenship, but will also advert to the factors set out by § 1332(c) that establish corporate citizenship." (*District of Columbia ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1043-44 (D.C.Cir.1986)). The court must then examine those factors and the facts in the record and determine whether diversity exists.[9] When jurisdiction is challenged, courts generally do not accept the *carte blanche* naked allegations of diverse citizenship or bald assertions of jurisdictional facts. *See, e.g., Coburg*, 369

[9] "To determine whether a party has adequately presented facts sufficient to establish federal diversity jurisdiction, appellate courts must look to the face of the complaint, ignoring mere conclusory allegations of jurisdiction." *Penteco Corp. Ltd. P'ship–1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir.1991) (citations omitted). Because federal courts are courts of limited jurisdiction, there is a presumption against its existence, and the party invoking federal jurisdiction bears the burden of proof when diversity is challenged. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir.1974); *see also Whitelock v. Leatherman*, 460 F.2d 507, 514-15 (10th Cir.1972) (allegations of mere residence may not be equated with citizenship for the purposes of establishing diversity and where the pleadings are found wanting, an appellate court may review the record for evidence that diversity exists).

F.3d 811, (requiring Plaintiff to state a substantial federal claim and declining to base jurisdiction upon an allegation that his employer violated "his constitutional rights"); *Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 145 F.3d 660, (4th Cir.1998) (declining to accept conclusory allegations of residence as prima facie proof of citizenship for diversity purposes and collecting cases on similar points); *cf. Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1029 (6th Cir.1968) ("Jurisdiction is not conferred on a federal court in a non-diversity case by mere conclusory allegations that one's constitutional or civil rights have been violated."); *Powder Power Tool Corp. v. Powder Actuated Tool Co.*, 230 F.2d 409, 414 (7th Cir.1956) ("The rule is firmly settled that the mere allegation of the jurisdictional amount when challenged as it was here is not sufficient and that the burden is upon the plaintiff to substantiate its allegation." (citation omitted)). Indeed, "[w]here the pleadings are found wanting, an appellate court may also review the record for evidence that diversity does exist." *Penteco*, 929 F.2d at 1521 (citing *Sun Printing & Publ'g Ass'n v. Edwards*, 194 U.S. 377, 382, 24 S.Ct. 696, 48 L.Ed. 1027 (1904)); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *F & S Constr. Co. v. Jensen*, 337 F.2d 160 (10th Cir.1964); *Buell v. Sears, Roebuck & Co.*, 321 F.2d 468 (10th Cir.1963).

The district court, however, denied the Roches' motion for remand, concluding that Lincoln Property Company was a citizen of Texas based upon its incorporation and principal place of business there. J.A. at 1974. The court also concluded that "Lincoln Property Company is not a citizen of Virginia since the company is not registered to conduct business in Virginia." *Id.* The court did not determine the citizenship of the real parties in interest. The court did recognize, however, that "Lincoln operates under many different structures and that [Jeff Franzen, a Virginia citizen,] is a **partner** in new deals." *Id.* (emphasis added). And, while acknowledging that Lincoln's "corporate website" designates Jeff Franzen as a "partner" but

"does not specify the partnership to whom Mr. Franzen belongs," the court concluded that "this evidence fails to demonstrate that Mr. Franzen was a partner in either Defendant Lincoln or its subsidiary EQR." J.A. at 1975. The burden of demonstrating diversity, however, is not on the Roches; the burden is on Lincoln. *Burden*, 60 F.3d at 216. Thus, the district court erred by weighing the evidence in favor of Lincoln.

By its own admission, Lincoln operates under many different structures and Jeff Franzen and Fred E. Chaney are both "partner[s]" of some Lincoln entity related to this action. J.A. at 1601, 1605-06. Indeed, Lincoln's 30(b)(6) deponent, in his deposition as spokesperson for Lincoln, indicated that "we're a partnership" with "multiple structures that we operate under." And, Jeff Franzen is a Lincoln "partner" and a resident of Virginia.[10] Only after Lincoln's 30(b)(6) deponent testified that Franzen was a "Senior Vice President/Partner" did Franzen file a self-serving affidavit contending that he is "referred to as a 'Partner' because [he is] a partner in several Texas limited partnerships that are involved in the acquisition and development of properties." J.A. at 1608. Curiously, he never identifies those other limited partnerships, nor is there any evidence as to how they are distinct or uninvolved in Lincoln's Virginia business enterprises and many Virginia property holdings, nor does Franzen identify any of his partners.

Nonetheless, at oral argument and in its briefs, Lincoln admitted that "the entity that receives the management

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[10] John LeBeau, who is an executive officer of Lincoln, testified that Jeff Franzen is the "highest ranking officer" in Lincoln's Herndon Virginia regional office and that he is "Senior Vice President, **partner**." J.A. at 1606 (emphasis added). When pressed farther, LeBeau could not (or would not) identify precisely the entity of which Jeff Franzen was a "partner." Indeed when asked whether "[h]e is a partner in Lincoln Property Company," LeBeau responded, "I don't know what he is a partner of." *Id.* In light of Lincoln's burden of establishing diversity, this ambiguity – created by Lincoln – surely cannot be resolved in favor of finding diversity.

fees for Westfield Village Apartments" is "EQR/Lincoln Limited Partnership." J.A. at 1531. Lincoln also concedes that the citizenship of a limited partnership is determined by reference to **all** of its partners. *See* J.A. at 1556 (citing *Carden*, 494 U.S. at 192-93, 110 S.Ct. 1015). But, Lincoln fails to carry its burden of demonstrating that each of its partners are not Virginia citizens. In its casual attempt to demonstrate diversity, Lincoln discloses the names of only two "general partners" in EQR/Lincoln Limited Partnership: (1) Lincoln Management Corporation, a Texas Corporation with its principal place of business in Dallas, Texas; and (2) Lincoln Placeholder Limited Partnership, which is allegedly "a Texas partnership." *See, e.g.*, J.A. at 1562, 1574.

Nowhere in its brief, its declarations of its general counsel, nor in the various foreign state corporation records appended to the record, has Lincoln disclosed the identity of any of its **limited partners**. Indeed, the Certificate of Limited Partnership certified by the Delaware Secretary of State discloses only the name of EQR/Lincoln Limited Partnership's "general partners," to wit: Lincoln Eastern Management Corporation and Lincoln Placeholder Limited Partnership. J.A. at 1574. As, Lincoln no doubt concedes, however, the citizenship of a limited partnership is determined by the citizenship of **all** of its partners, **both limited and general**. J.A. at 1556 (D.C.Op.) (citing *Carden*, 494 U.S. at 192-93, 110 S.Ct. 1015). And, a limited partnership has, at minimum, one or more general partners **and one or more limited partners**. *See, e.g., Newport Ltd. v. Sears, Roebuck and Co.*, 941 F.2d 302, 306 n. 6 (5th Cir.1991) (discussing modern partnership codes and citing Tex.Rev.Civ. Stat. Ann. art. 6132a-1 (limited partnerships have one or more general partner and one or more limited partner)); 6 Del. Cd. § 17- 101(9) (defining a "limited partnership" as "a partnership formed by 2 or more persons under the laws of the State of Delaware and having 1 or more general partners and 1 or more limited partners"). The partnership filings in the record, however, do not disclose the

identity or citizenship of **any** of EQR/Lincoln Limited Partnership's limited partners.[11] Thus, we can not know whether any of them is a Virginia citizen.

Ultimately, therefore, given the affirmative evidence in the record (that Jeff Franzen, a Virginian, is a Lincoln "partner" and that Lincoln has a "partnership" that is "authorized and registered in Virginia"), and the lack of sufficient evidence to the contrary, we cannot say that Lincoln has met its burden of establishing diversity.[12]

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[11] Lincoln's business structure is quite confusing, and nowhere in the record documents pertaining to this issue did we find the names of the limited partners in any of these limited partnerships. For example, the original certificate of limited partnership for EQR/Lincoln Limited Partnership was filed November 13, 1997, designating both Lincoln Eastern Management Corp. and Lincoln Placeholder Limited Partnership as "general partner[s]." J.A. 1573-74. No limited partners were disclosed. That certificate was later corrected on November 19, 1997, only to state that "the sole General Partner is Lincoln Eastern Management Corporation, a Texas corporation. . . ." J.A. at 1575. The Limited Partnership Agreement, effective November 13, 1997, however, designates Lincoln Eastern Management Corporation as both general and limited partner of EQR/Lincoln Limited Partnership. J.A. 1576-77. However, a limited partner generally may not be a general partner. *See, e.g., Unger v. C.I.R.*, 936 F.2d 1316, 1318 (D.C.Cir.1991) (noting that general partners are managers of partnership and that "a limited partner may not participate in the active management of the enterprise"); *Magneson v. C.I.R.*, 753 F.2d 1490, 1498 (9th Cir.1985) ("limited partner may not actively participate in running the business" as a general partner). And, Lincoln Placeholder Limited Partnership's general partner is Lincoln Eastern Management Corporation and its limited partner is Lincoln E.C.W. Property Management, Inc. J.A. at 1591.

[12] Another reason jurisdiction may be lacking stems from the Roches' conversion claim. In their original state complaint, Supp. J.A. at 63, and in their amended federal complaints, J.A. at 198-199, the Roches contend that their personal property was "dispossess[ed,]" without their consent, "destroy[ed]," "wrongfully withheld," "converted," and "lost or stolen." Thus, the Roches contend, as was made clear at oral argument, that Lincoln and Barco (the Virginia environmental company hired by Lincoln to perform mold remediation) were "bailees" of their property. In its defense, Lincoln contended at oral argument that Barco, not Lincoln, was the bailee and that, under a bailment theory, Lincoln could not be liable for conversion of the Roches' property because their property was bailed only to Barco.

Indeed, the further we look the more dubious the diversity of citizenship inquiry becomes. In this case, the citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises; but mostly, Lincoln's failure to disclose all of the necessary jurisdictional facts. The negative inferences resulting from these obscurities, however, must be borne by Lincoln, who created them, not the Roches and not the federal courts.[13]

IV.

The present controversy is a classic landlord-tenant dispute, which most often is litigated in state court and is far less often the proper subject of federal jurisdiction.

Indeed, it was Lincoln's position that SWIB and Barco are the real parties in interest with respect to the conversion claim. And, as Wright and Miller have noted: "As a result of looking at the citizenship of the real party in interest and because of express reference to them in the second sentence of Rule 17(a) [requiring cases to be litigated in name of real parties in interest, including executors, administrators, bailees, *etc.*], federal courts have held that the citizenship of an executor, administrator, guardian, bailee, or trustee is determinative in measuring the court's jurisdiction." Wright & Miller, 6A Fed. Pract. & P. Civ.2d § 1556 at 422-23 (emphasis added) (citing, with regard to bailees, *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818 (8th Cir.1951)); *see also Kidwell ex rel. Penfold v. Meikle*, 597 F.2d 1273, 1287 (9th Cir.1979) (finding no jurisdiction under any basis because Rule 17(a) requires cases to be litigated in name of real party in interest, who was not joined or did not consent to litigation); *cf. Certain Interested Under-writers at Lloyd's, London*, 26 F.3d 39, 43 n. 1 (6th Cir.1994) (noting that Supreme Court observed in *Navarro*, *supra*, that "Rule 17(a) frequently overlaps with the jurisdictional rule that diversity jurisdiction depends on the citizenship of the real parties to the controversy, but 'the two rules serve different purposes and need not produce identical outcomes in all cases.'" (citation omitted)). We shall nonetheless defer further consideration of this concern, seeing that the more crucial dispute concerns the citizenship of Lincoln and its relevant enterprises.

[13] An additional reason for employing the real party in interest test when construing the diversity statute is, aside from federalism, is "to avoid burdening the federal court system with cases that do not present a federal question or a threat of prejudice. . . ." Wright & Miller, 6A Fed. Pract. & P. § 1556 at 422.

Indeed, we have been reluctant to get involved in local disputes over land and property. *Cf. Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir.1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of federal courts. . . . Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes."). There is ample record evidence that the property at issue is located in Virginia, the mold abatement services contracted for were performed in Virginia by a Virginia company, Lincoln maintains several rental properties in Virginia other than the one at issue here, Lincoln has a regional office in Virginia,[14] and all of the correspondence and communication related to this controversy occurred in Virginia. *See* J.A. at 669-691. Moreover, Lincoln's Texas office is rarely, if at all, referenced in the record. *See, e.g., id.* All of this militates in favor of finding that the real and substantial party in interest is the Lincoln entity (partnership or not); probably, EQR/Lincoln Limited Partnership, which "is an authorized and registered partnership *in Virginia*." J.A. at 1974 (emphasis added).

The obvious and elementary policy behind diversity jurisdiction is that an out-of-state defendant should be entitled to a federal forum if he decides that he cannot receive a fair trial in a state court due to local prejudice. *Asher v. Pacific Power & Light Co.*, 249 F.Supp. 671, 674 (N.D. Cal.1965). As the Court of Appeals for the Third Circuit recognized in *Dresser Indus., Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494 (3d Cir.1997), the purpose of diversity jurisdiction is to provide a tribunal free from

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[14] Most of the communications between the Roches and Lincoln were directed to and received by Lincoln Property Company at "115 Herndon Parkway, Suite 100 Herndon, VA 20170" and responses from Lincoln were sent from "Westfield Village Apts. 5115 Woodmere Dr. # 103, Centreville, VA 20120." J.A. at 670-686.

local prejudice. *See id.* at 499. Thus, the *Dresser* Court reasoned:

> If diversity jurisdiction exists because of a fear that the state tribunal would be prejudiced towards the out-of-state plaintiff or defendant, that concern is understandably allayed when that party is joined with a citizen from the forum state. Indeed, when members from the forum state are present on both sides of the controversy, it becomes more difficult to imagine that a state tribunal would favor one side based upon biases in favor of its own citizens.

Id. at 499 (citations omitted).

In this case, the concerns upon which diversity jurisdiction are founded are easily allayed. Even though the nominal party and ultimate parent company, Lincoln Property Company, is a Texas citizen, it is certainly not an alien to Virginia. From the record, it appears that the real and substantial party in interest is the Virginia subsidiary, be it a partnership, corporation or otherwise, rather than the Texas parent. Moreover, the real party in interest owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth, which is much stronger than any nexus to Texas made apparent by the record.[15] Thus, to be accurate, both the Texas parent and the Virginia sub-"partnership" should be parties to the instant action.[16] Whether both are joined, or the action is maintained against the Virginia real party(ies) in interest, complete diversity would not exist and the case should be

[15] We also note that, although the Roches sued the Texas parent company, they effected service of process upon Lincoln's registered agent in Virginia.

[16] Given the manner in which Lincoln conducts business (using many different structures) and the confusion which is created thereby, it is not surprising that Plaintiffs named the parent company *ab initio* rather than engaging in a confounding wild goose chase – it has even confused this Court – to determine the real party in interest.

remanded. *See* 28 U.S.C. § 1447(e).[17] In any event, the citizenship of the nominal parties listed on the Complaint is in no way dispositive of a subject matter jurisdiction challenge. Because the parties may not waive or consent to federal subject matter jurisdiction – indeed we must raise it *sua sponte* if jurisdiction appears questionable – the nominal parties cannot provide a valid basis for finding jurisdiction. *See State v. Ivory*, 906 F.2d 999, 1001 n. 2 (4th Cir.1990) (noting that subject matter jurisdiction may not be waived and we have authority to raise the matter, even *sua sponte*).

Neither in the removal petition nor in the record is there sufficient indicia – by a preponderance of the evidence – that one member of the Lincoln group of companies doing business in Virginia is not a citizen of the Commonwealth. Seeking removal, Lincoln had the burden of establishing diversity. *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir.1986). As the burden has not been met, federal jurisdiction does not exist. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); *see also Ivory*, 906 F.2d at 1001 (noting that "we may properly consider on appeal whether jurisdiction exist[ed] at the time of judgment" and concluding it did not exist) (internal quotation marks omitted) (citing *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972); *Rockwell Int'l Credit Corp. v. U.S. Aircraft Ins. Group*, 823 F.2d 302, 304 (9th Cir.1987)) (burden on party seeking federal jurisdiction to establish

[17] 28 U.S.C. § 1447(e) provides the district court with two options: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." Since joinder of the "real party in interest" would be required under Rule 17(a), the district court's options would likely be limited to remand; the court does retain some discretion, though. We have held that: "These are the only two options for a district court faced with a post-removal attempt to join a nondiverse defendant; the statute does not allow a district court to retain jurisdiction once it permits a nondiverse defendant to be joined in the case." *Mayes v. Rapoport*, 198 F.3d 457, 462 (4th Cir.1999).

diversity of real parties in interest); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.1966) (addressing subject matter jurisdiction, even though defendant did not seek leave to appeal district court's denial of its motion to dismiss on the ground that plaintiff and limited partner of defendant general partnership were not diverse).

V.

At the end of the day, the burden of establishing diversity remained upon Lincoln. And, Lincoln failed to carry its burden. Thus, we are left only to conclude that our lack of confidence in the allegedly diverse citizenship of Lincoln's real party in interest precludes our jurisdiction. 28 U.S.C. § 1331(a). If this were a different case, where Defendants merely inadvertently failed to present evidence of diversity, we might be sympathetic and consider remanding this case back to the district court for further proceedings so as to allow Defendants an opportunity to cure their inadvertence. *See, e.g., Clephas v. Fagelson, Shonberger, Payne & Arthur*, 719 F.2d 92, 94 (4th Cir.1983) (noting that "it was a mere inadvertence that led the plaintiff to omit allegation and proof" of diversity and that "provided that we were persuaded that the plaintiff's case had merit, would view sympathetically a motion to enter an order remanding this case to the district court to permit the plaintiff belatedly to allege and prove such diversity of citizenship"). The issue of diversity jurisdiction, however, was extensively litigated below. Thus, this case is not one of inadvertence and we, therefore, would not be sympathetic to a motion of the kind discussed in *Clephas*, *supra*.

Consequently, the present record is insufficient to sustain the jurisdiction of the court below or the jurisdiction of this court except for the application of jurisdictional limitations. Finding that we lack subject matter jurisdiction, we can not address the merits of the case. Rather, we reverse the judgment of the district court on the issue of subject matter jurisdiction, we vacate the remainder of the court's judgment, and we remand the case back to the

district court with instructions to remand the case to the Virginia Circuit Court for Fairfax County.

REVERSED IN PART, VACATED IN PART, AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[Filed Apr. 16, 2003]

ORDER

THIS MATTER is before the Court on Defendants', Lincoln Property Company ("Lincoln") and the State of Wisconsin Investment Board ("SWIB"), motions to bar the testimony by Richard Bernstein, M.D., and for summary judgment on all claims; and, on Plaintiffs', Christophe and Juanita Roche, motion for summary judgment. For the reasons to be stated in a forthcoming Memorandum Order, Defendants' Motion to bar the testimony by Richard Bernstein, M.D., is GRANTED. Furthermore, Defendants' Motion for Summary Judgment as to all of Plaintiffs' claims is GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED.

The Court DIRECTS the Clerk to remove this case from the trial docket, and the parties are instructed to stop their trial preparation.

The statute of limitations for appeal of this decision is tolled until the Court enters its forthcoming Memorandum Order and Judgment. This Order does not constitute

a "judgment" as defined in Federal Rule of Civil Procedure 54(a).

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 16th day of April, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
04/16/03

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

MEMORANDUM ORDER

THIS MATTER is before the Court on the Plaintiffs' and the Defendants' motions for summary judgment on all claims. This case concerns alleged personal injuries and property damage suffered by the Roches as a consequence of exposure to toxic molds at an apartment at Westfield Village Apartments, a complex owned by the State of Wisconsin Investment Board ("SWIB") and managed by Lincoln Property Company ("Lincoln"). The issue before the Court is whether there exists a genuine issue of material fact concerning the handling of the Plaintiffs' complaints about the mold and leaks in their apartment, the remediation of the Plaintiffs' apartment, and the storage of the Plaintiffs' personal property by Lincoln and SWIB which precludes granting summary judgment in favor of the Defendants on Plaintiffs' claims of negligence per se, common law negligence, breach of the implied warranty of habitability, conversion, and punitive damages. The Court finds that there are no genuine issues of material fact in dispute and holds that Defendants are entitled

to judgment as a matter of law on all of the counts of the Second Amended Complaint. Plaintiffs fail to present a claim for either negligence per se or ordinary negligence because they fail to establish that the Defendants owed Plaintiffs a duty, proximate causation, and damages. Defendants are entitled to summary judgment on the implied warranty of habitability claim because the law of the case has established that there is no implied warranty of habitability between a landlord and a tenant. Plaintiffs fail to establish a claim for conversion because they are unable to show either how the Defendants have exercised rights over their chattels to their exclusion or how the mold in the apartment had deprived them of their right to the chattel. Defendants are entitled to summary judgment on Plaintiffs' claim for punitive damages because the Court had previously ruled that the Plaintiffs' initial Motion for Judgment had failed to set out sufficient facts to support a claim for punitive damages and Plaintiffs' Second Amended Complaint does not cure these deficiencies. Furthermore, the Court denies Plaintiffs' motion for summary judgment because the motion is procedurally deficient because it fails to comply with the mandates of Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7(E) and 56(B).

I. BACKGROUND

Christophe and Juanita Roche and their children lived in an apartment at Westfield Village from April 2001 to March 2002. The Roches claim that their apartment was poorly maintained, that there were water leaks, holes in the wall, and mold growing within the apartment. The Roches contend that, as a result of being exposed to toxic levels of mold, they currently suffer respiratory and other ailments.

Plaintiffs leased their apartment from SWIB on March 30, 2001. Lincoln managed the Westfield Village Apartments in Centreville, Virginia. Plaintiffs complained to Lincoln about the poor condition of their apartment,

verbally on several occasions and complained in writing on three occasions. Plaintiffs complained of water leaks needing repair, of holes that had been cut in the wall, of the carpet being torn up, and of "the fact that mold was all over [the] apartment." (Compl. ¶ 17.) The Defendants responded to the written requests within 24 hours and sent maintenance personnel and outside contractors to Plaintiffs' apartment to assess the service calls and to perform repairs. On January 16, 2002, the Plaintiffs sent a letter to Lincoln complaining about the status of the repairs to their apartment and the appearance of mold throughout their apartment. On March 8, 2002, Plaintiffs notified Lincoln that they had retained Ronald G. Ginste of Potomac Environmental Testing Services ("PETS"), to conduct testing for the presence of mold in the apartment. PETS found several types of mold present in the apartment; specifically Stachybotrys, Cladosporium, Penicillium, Aspergillus, Smuts, Hyphal elements and epicoccum. PETS also suggested that the Plaintiffs vacate the apartment for their own safety. Lincoln placed the Plaintiffs in a hotel and subsequently into another unit at the Village of Potomac Falls.

Lincoln retained BARCO Enterprises, Inc., ("BARCO") to remediate Plaintiffs' personal property. Plaintiffs requested that any remediation attempt would have to result in the personal property being free of the three toxic microbes found in the apartment. On March 23, 2002, Plaintiffs sent a letter to BARCO and Lincoln consenting to the removal of their personal property for remediation purposes. In April 2002, BARCO inventoried, separated the personalty into decontamination and disposal categories, wrapped and removed all of the items of personal property in Plaintiffs' apartment. BARCO provided the Plaintiffs with an inventory of the property in storage. Plaintiffs assert that the inventory is incomplete and lacks several of Plaintiffs' most valuable possessions. After several communications between the Plaintiffs and Invesco's counsel (Invesco is no longer a party to this

case), Invesco sent a follow-up letter to Plaintiffs' counsel informing him that Plaintiffs had not advised Invesco concerning the disposition of the property, which was in sealed storage containers at BARCO's facility. In his response, Plaintiffs' counsel stated that "action taken to harm or destroy any of the property would be considered a conversion and an intentional act for which we will seek redress" and demanded that Invesco reimburse Plaintiffs the value of the personalty – $160,000.00. Plaintiffs' personal property remains in storage at BARCO in the same condition as when it was removed from Plaintiffs' apartment.

Subsequent to leaving the apartment in March 2002 and after having filed this action, Plaintiffs sought treatment from Richard Bernstein, M.D., an allergist. Mr. Roche complained of memory loss, chronic headaches, sinus problems, mild hypersensitivity to smells and chronic nasal stuffiness. (Defs.' Mem. Supp. Mot. to Exclude Richard A. Bernstein, Ex. D. at 2.) Mrs. Roche complained of memory loss, chronic upper respiratory sinus symptoms, some chest congestion and shortness of breath. (*Id.* at 4.)

Defendants filed a motion to exclude Dr. Bernstein's testimony as to specific causation for both Plaintiffs' personal injuries based on Dr. Bernstein's failure to adhere to principles enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Defendants also filed a motion for summary judgment on Plaintiffs' claims for personal injury on the basis that Plaintiffs lacked sufficient causation because Dr. Bernstein stated that there were many possible causes for Plaintiffs' allergic reactions. In addition, the parties filed cross-motions for summary judgment on all remaining claims. By separate Memorandum Opinion and Order, the Court granted Defendants' motion to exclude Dr. Bernstein's testimony. The Court is now prepared to rule on the parties' cross-motions fox summary judgment on all claims, including

Defendants' motion for summary judgment on Plaintiffs' claim for personal injury.

II. DISCUSSION

The Defendants are entitled to summary judgment as to the negligence per se and common law negligence claims because Plaintiffs are unable to establish the duty that the Defendants owed, proximate causation, or damages. The Defendants are entitled to summary judgment as to the implied warranty of habitability claim because this claim is precluded by the law of the case. Furthermore, the Defendants are entitled to summary judgment on the conversion claim because Plaintiffs are unable to raise an genuine issue of material fact showing that the Defendants exercised rights over the Plaintiffs chattels to their exclusion or that the mold in the apartment deprived the Plaintiffs of their rights to the chattels. Plaintiffs fail to set forth a claim for punitive damages. Lastly, the Court denies Plaintiffs' motion for summary judgment because the motion is procedurally deficient.

A. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Rule 56(e) requires the nonmoving party to

go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This standard of review sets forth the procedural framework for the Court's analysis; each subsection contains the rule of law that applies to each individual claim.

B. Analysis

1. Negligence Per Se

In order to state a claim for negligence per se, a plaintiff must establish that: (1) the defendant violated a statute that was enacted for public safety; (2) the plaintiff belongs to the class of persons for whose benefit the statute was enacted; (3) the harm that occurred was of the type against which the statute was designed to protect; and (4) the statutory violation was a proximate cause of his injuries. *Halterman v. Radisson Hotel Corp.*, 523 S.E.2d 823, 825 (Va. 2000). The Court finds that Plaintiffs fail to set forth a claim for negligence per se because they fail to establish (1) the duty that the Defendants owed, (2) proximate causation between any breach of that duty and any injury, and (3) any damage that resulted from the alleged breach.

Although Plaintiffs assert violations of several "building codes", the only statute that is on point is the Virginia Residential Landlord Tenant Act ("VRLTA"), Va. Code § 55-248.2, *et seq.* The relevant section is 55-248.13, which provides that a landlord shall maintain fit premises to include:

> (1) compl[iance] with the requirements of applicable building and housing codes materially affecting health and safety; (2) mak[ing] all repairs and do[ing] whatever is necessary to put and keep the premises in a fit and habitable condition; . . . ; (4) maintain[ing] in good and safe working order and

> condition all electrical, plumbing, sanitary, HVAC, required to be supplied by the landlord; . . . .

The statute further provides that a tenant may recover damages and obtain injunctive relief for noncompliance by the landlord with the provisions of the rental agreement or of the statute. Va. Code §§ 55-248.21 and -248.40. Thus, central to Plaintiffs' claim is a finding that the apartment at the Westfield Village Apartments was "uninhabitable." To establish that mold presents a potential health hazard, the types of molds, the mycotoxins produced by these molds, and the individuals' responses or reactions to these mycotoxins must be assessed. (Ginste Dep. at 64:6-65:16.) This assessment is outside the knowledge of a layperson and must be made and presented by qualified experts.

Plaintiffs proffer the testimony of Ronald Ginste, their expert in industrial health hygiene, to support their contention that the Roches' apartment was uninhabitable. However, in his deposition, Mr. Ginste testified that he had no opinion as to whether Plaintiffs' apartment was unfit and uninhabitable. (*Id.* at 150:18-151:1.) Mr. Ginste stated that, in order for him to determine whether the mold in the Plaintiffs' apartment was toxic, he would have to know the level of mycotoxins that were present in the apartment. (*Id.* at 64:6-65:16.) Plaintiffs counter that Mr. Ginste was awaiting certain test results when he was deposed and that the test results showed that the mold found in the apartment was producing mycotoxins and that this rendered the apartment uninhabitable.

There are several problems with Mr. Ginste's testimony and the subsequent affidavit. First, the test was performed on a bulk sample obtained from the Plaintiffs' apartment, not at the apartment; and the test was done one year after the sample was removed from the apartment. (Bertram Dec., Ex. 3 at B.) Second, the testing merely demonstrated that mycotoxins grew out of the mold spores on one of the samples, but fails to establish

the level or quantity of mycotoxins present in the apartment. Third, Mr. Ginste admits, in his affidavit, that his opinion regarding habitability was based partly on his discussions with Dr. Jarvis (the owner of the laboratory performing the mycotoxin test) (Pls.' Mem. Opp'n Summ. J., Ex. 24); thus, Mr. Ginste's opinion on this fact is based on inadmissible hearsay. Fourth, Mr. Ginste's affidavit contradicts his deposition testimony, and, generally, where a party submits an affidavit that contradicts their deposition testimony, the courts disregard the affidavit for summary judgment purposes. *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999). Fifth, Mr. Ginste also conceded at his deposition that he did not consult with any physician or toxicologist after he tested the apartment to determine whether the mold in Plaintiffs' apartment was hazardous or posed health risks. (Ginste Dep. at 58:12-59:5.) From the foregoing, Mr. Ginste's expert opinion fails to establish that the apartment was uninhabitable, and the Plaintiffs cannot establish that Lincoln or SWIB failed to maintain the facilities in a habitable condition in violation of the VRLTA.

Plaintiffs also contend that the Defendants violated certain building codes, specifically a regulation providing that plumbing fixtures shall be properly installed and maintained in good working order. (*See* Pls.' Mem. Opp'n Summ. J. at 19-20 (citing BOCA National Property Maintenance Code, § PM-505.1 (5th Ed. 1996)).) Plaintiffs' reliance on this code provision is inapposite because they are not contending that the plumbing fixtures in their apartment were not operational, unsafe or unsanitary. The Court finds, however, that Plaintiffs fail to offer any evidence demonstrating the duty and or the industry standards imposed by the VRLTA or any building code or how the Defendants violated the VRLTA or other various statutes or codes. Plaintiffs also maintain that the fact that the Defendants engaged in the remediation of the apartment is evidence that the apartment was uninhabitable; however, evidence of remediation is inadmissible

under the subsequent remedial measures doctrine of the Federal Rules of Evidence. Fed. R. Evid. 407; *see Albrecht v. Baltimore & Ohio RR Co.*, 808 F.2d 329, 331-32 (4th Cir. 1987). Thus, Plaintiffs fail to establish that Defendants violated any applicable building code or statute.

Assuming, *arguendo*, that Plaintiffs establish that the Defendants violated a statute or building code, the Court finds that Plaintiffs satisfy the second element of a claim for negligence per se: Plaintiffs belong to the class of persons for whose benefit the statue [*sic*] was enacted – tenants. Defendants do not dispute this finding. As to the type of harm against which the statute was designed to protect, the Plaintiffs' alleged injuries could arguably have resulted from the mold found within the apartment; thus, the Court finds that Plaintiffs meet the third element of a negligence per se cause of action – but only for argument purposes.

As to proximate causation, the Court holds that from the exclusion of the expert testimony by Dr. Bernstein that summary judgment is proper in favor of the Defendants: there is insufficient evidence of causation to create a genuine issue of material fact. In general, expert testimony is required to prove that exposure to a certain substance caused a certain injury or illness. *See Cavallo v. Star Enterprise*, 892 F. Supp. 756, 774 (E.D. Va. 1995), *rev'd in part on other grounds*, 100 F.3d 1150 (4th Cir. 1996) (requiring expert testimony to establish proximate causation between exposure to AvJet fumes and chronic respiratory problems); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 612 (7th Cir. 1993) (requiring expert testimony to establish nexus between ibuprofen and renal failure). Based on the Court's findings of fact and conclusions of law in its Memorandum Opinion of July 25, 2003, excluding Dr. Bernstein's testimony as to proximate causation for the Plaintiffs' personal injuries, the Court concludes that Defendants are entitled to summary judgment

on Plaintiffs' claim for personal injuries resulting from Defendants' negligence per se.

As to the alleged damages to their chattels, Plaintiffs fail to proffer any evidence that their personal property was damaged through Defendants' alleged negligence. Plaintiffs maintain that their chattels were damaged by the mold in the apartment. However, no tests were performed, by either party, to determine the presence of mold within the chattels – except for the motor vehicle. Mr. Ginste did not perform any tests on the Plaintiffs' personal property, other than their vehicle. Plaintiffs argue that the proof of damage to their property by mold lies in the fact that their personal property was removed from the apartment by BARCO in full body protective clothing, masks and gear. Further evidence is BARCO's designation of two trailers of belongings: one for items that could be decontaminated and the other for items that should be discarded. Arguably, these circumstances would tend to show that the personal property had been contaminated; however, the Plaintiffs have not offered any objective findings or evidence to support their claim that their chattels were proximately damaged by Defendants' negligence per se. Plaintiffs offer only unsubstantiated arguments and theories and fail to raise any genuine issues of material fact as to the damage to their personalty caused by the Defendants' alleged negligence per se. From the foregoing, the Court holds that Defendants are entitled to summary judgment on Plaintiffs' claim for damages to their personal property as a result of Defendants' negligence per se.

2. Common Law Negligence

Plaintiffs fail to set forth, in the Second Amended Complaint, any claim for ordinary negligence. Under Virginia law, the essential elements of a negligence claim are: (1) the identification of a legal duty of the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff proximately caused by the breach. *Talley v.*

Danek Medical, Inc., 179 F.3d 154, 158 (4th Cir. 1999). The standard of conduct that a party must conform to is that of "a reasonable man under like circumstances." *Id.* The burden is "upon the plaintiff to show that the defendants deviated from the standard of ordinary care, either by failing to observe applicable trade customs and building code provisions or by some other defalcation." *Morrison-Knudsen Co. v. Wingate*, 492 S.E.2d 122, 124 (Va. 1997). Plaintiffs argue that the Defendants breached their duty of due care by failing to disclose that the apartment had a latent defect, mainly that the apartment contained "recalled leaky pipe[s]." (Pls.' Mem. Opp'n Summ. J. at 25.) Plaintiffs also maintain that the Defendants were negligent in replacing the polybutylene piping and in their remediation efforts. (*Id.*)

Plaintiffs contend that *Powell v. John E. Hughes Orphanage*, 138 S.E. 637, 641 (Va. 1927), establishes a duty upon the landlord to notify the tenant, at the time the tenant takes possession of the property, of any dangerous conditions. Plaintiffs offer the Defendants' mold policy, which was in effect when the Plaintiffs moved into the apartment, to support their contention that the Defendants had notice of how mold developed and that this mold could be dangerous. Contrary to Plaintiffs' interpretation of *Powell*, that case stands for the proposition that a landlord must put the tenant on notice of any dangerous condition at the time the tenant takes possession of the property. *Id.* Plaintiffs, however, have failed to offer any evidence that the Defendants had prior knowledge that the polybutylene piping in Plaintiffs' apartment created a dangerous condition. Plaintiffs maintain that the Defendants, through their standing policy on mold, had prior knowledge that the Roches' apartment contained polybutylene piping and that this type of piping could develop leaks. However, this fact alone does not establish that the Defendants knew that these leaks were present in Plaintiffs' apartment prior to their moving in. Plaintiffs fail to

carry their burden on this point and fail to raise any genuine issue of material fact.

As to Plaintiffs second theory of recovery under common law negligence that the Defendants were negligent in replacing the polybutylene piping and in their remediation efforts, Plaintiffs contend that the standard of care is the customary industry standard set forth in the Defendant's own policy on handling mold cases combined with those standards established by the Environmental Protection Agency ("EPA"), the Center for Disease Control and Prevention ("CDC") and the state health departments. Plaintiffs, however, fail to set forth any specific provisions, of the regulations issued by the aforementioned agencies, that establish an industry standard. Plaintiffs fail to provide any qualified expert testimony concerning the nature and existence of the leaks, the corrective measures taken by Defendants, and how the Defendants violated the specific trade customs or building codes. Plaintiffs have also not identified any witnesses who will testify as to the "customary industry standards," including: (1) the replacement of polybutylene piping; (2) standards for inspecting heating and air conditioning units, substrate duct material, and condensation drain lines and filtration systems employed in heating, ventilation and air conditioning systems; (3) standards of repairing leaks and waterproofing apartments in order to prevent mold; or (4) standards for selecting appropriate remediation systems that would have prevented mold formation. (Second Am. Compl. ¶ 53.) Plaintiffs cite to the Defendants' own policies on the treatment of mold as establishing an appropriate standard of care. However, a corporation's internal policies do not create a legal standard of care. *Pullen v. Nickens*, 310 S.E.2d 452, 456 (Va. 1983). Consequently, Plaintiffs cannot establish that Defendants were negligent simply for failing to comply with their own internal policies. Thus, Plaintiffs fail to adduce evidence of the relevant standard of care and Defendants are entitled to summary judgment as a matter of law.

As discussed in Part II.B.1., *supra*, Plaintiffs fail to establish proximate causation between any negligence on Defendants' part and their personal injuries or damage to their personal property. Therefore, for the reasons stated above, Defendants are entitled to summary judgment as a matter of law as to Plaintiffs' claim of common law negligence.

3. Breach of Implied Warranty of Habitability

By an Order dated November 27, 2002, the Court dismissed, as a matter of law, Plaintiffs' claim under a breach of an implied warranty of habitability. Plaintiffs re-assert their claim under the auspice that "when this Count was refiled, it was in a different version and differently worded." (Pls.' Mem. Opp'n Summ. J. at 26.) Plaintiffs contend that there is an implied warranty of habitability that arises from the landlord's duties to provide reasonably safe premises and to perform its maintenance work in a workmanlike manner. (*Id.*) Furthermore, Plaintiffs allege, that an implied warranty of habitability arises from VRLTA's statutory warranty – an implied warranty that the apartment would be habitable and free from toxic and dangerous materials. (*Id.* at 27.) The Court's previous Order, addressing this matter on point, is the law of case, and Plaintiffs are precluded from asserting this claim. The existence of an express warranty voids the necessity for an implied warranty. For the reasons stated in the Court's Order of November 27, 2002, the Court grants Defendants' motion for summary judgment on the breach of implied warranty of habitability claim.

4. Conversion

Under Virginia law, conversion is "the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner's rights." *Economopoulos v. Kolaitis*, 528 S.E.2d 714 (2000). There is no conversion "if the taking is with recognition of the owner's rights, i.e., without

intent to deprive the owner of the property." Friend's Virginia Pleading and Practice § 27-13(1). In this case there are two potential conversion claims: (1) BARCO and the Defendants converted the Plaintiffs' personal property when they removed the property from the apartment, withheld the property and lost some of Plaintiffs' belongings, and (2) the Defendants converted Plaintiffs' property by exposing the property to mold to the extent that it was unsafe for the Plaintiffs to continue to possess it.

As to the first claim, BARCO removed the Plaintiffs' personal property from the apartment with the Plaintiffs' consent. The Parties had several discussions regarding the removal and remediation of the Roches' chattels. However, the Plaintiffs were not satisfied with the results that BARCO's remediation provided, and Plaintiffs' counsel subsequently notified BARCO that any action, without Plaintiffs' approval, was considered a conversion and an intentional act. Thus, BARCO continues to possess the Plaintiffs' property, and the Plaintiffs have not sought to either inspect or to retrieve their chattels from BARCO. Therefore, as a matter of law, the Plaintiffs fail to establish that the Defendants wrongfully exercised control over their chattels. The undisputed evidence demonstrates that the Plaintiffs consented to the removal of their personal property by BARCO and have abandoned it.

Plaintiffs also contend that BARCO and the Defendants failed to properly account and inventory their personal property because they are missing several valuables which were not found on any of BARCO's inventory lists. Plaintiffs rightfully assert that BARCO may have converted these valuables. However, for purposes of this case, BARCO is not a named defendant. Furthermore, conversion is an intentional tort, and, generally, a principal is not liable for its agent's intentional torts. Thus, if Lincoln or SWIB is the principal and BARCO is the agent, neither Lincoln nor SWIB could be liable for the intentional torts committed by BARCO.

As to their second conversion claim, that the Defendants converted their personal property by exposing their property to the mold in their apartment, Plaintiffs cite to BARCO's inventory list that identified personal property that could be decontaminated and personal property that should be disposed. However, BARCO's categorization was based upon whether the item was porous or nonporous. BARCO had not tested any of Plaintiffs' chattels to determine if they were in fact contaminated. Mr. Ginste, Plaintiffs' expert, did not test any of the Plaintiffs' personal property, outside of their vehicle, for contamination. Thus, even if BARCO classified an item in the "disposed" category, that item would not necessarily have to be disposed if a test would show that the item was not contaminated. Furthermore, there is no evidence that the items contained any mold at all, or whether the items were unsafe. Plaintiffs have failed to establish, as a matter of law, that the mold in the apartment had deprived them of their right to their chattels. For these reasons, Defendants are entitled to summary judgment on Plaintiffs' claim of conversion.

5. Punitive Damages

The Court had previously dismissed Plaintiff's claim for punitive damages because the Plaintiffs had failed to proffer any facts to support that claim. *See Roche v. Lincoln Property Co.*, No. 02-1390 (E.D. Va. November 27, 2002). Plaintiffs make identical allegations in their Second Amended Complaint regarding an award of punitive (or exemplary) damages. Defendants compare, in detail, the Plaintiffs' punitive damage allegations in their Second Amended Complaint to their original Motion for Judgment. The Plaintiffs fail to assert any basis for the Court to reverse its November 27, 2002 ruling dismissing Plaintiffs' punitive damages claim. Plaintiffs contend that Judge O'Grady, in a February 14, 2002 hearing, allowed the punitive damages claim to go forward; however, they mischaracterize Judge O'Grady's holding. Judge O'Grady

specifically stated that the Plaintiffs had alleged punitive damages in their Second Amended Complaint; however, the decision to allow this claim to go forward should be determined by this Court. Therefore, for the reasons stated in the Court's November 27, 2002 Order, the Court grants summary judgment in favor of the Defendants as to the Plaintiffs' claim for punitive damages.

6. Plaintiffs' Motion for Summary Judgment and Its Procedural Deficiencies

Although Plaintiffs filed a separate motion for summary judgment, the Court finds that the Plaintiffs' motion is procedurally deficient. Thus, in addition to granting Defendants' motion for summary judgment on its merits, the Court denies Plaintiffs' motion for summary judgment, as a matter of law, because of the motion's lack of compliance with the mandates of Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7(E) and 56(B).

Plaintiffs filed a five-page motion for summary judgment and failed to include a memorandum in support and failed to include any supporting evidence or authority demonstrating that they are entitled to summary judgment. Plaintiffs contend that "[f]ro (sic) the reasons to be stated in the Memorandum, supporting Affidavits, and arguments contained in the Response to Defendant's Motion for Summary Judgment, the plaintiffs are entitled to summary judgment on all three Counts." (Pls.' Mot. Summ. J. at 1.) Plaintiffs further contend that "[t]he arguments set forth in the plaintiffs' Responses are hereby incorporated as if fully set out, and the plaintiffs accordingly reserve the right to supplement this Motion with the Responses and arguments to the defendant's Motion for Summary Judgment, pursuant to Rule 56(c) and (e)." (*Id.*)

Outside of Rule 56, Plaintiffs fail to cite any authority for their contention that they can maintain a motion for summary judgment without setting forth any supporting evidence as to why they are entitled to summary judg-

ment. Under Rule 56(c), the moving party must identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-32. Under Local Rule 7(E), motions for summary judgment must "be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies." Also, under Local Rule 56(B), the moving party must also set forth a specifically captioned section "listing all material facts as to which the moving party contends there is no genuine issue and cite the parts of the record relied upon to support the listed facts as alleged to be undisputed."

Plaintiffs fail to comply with those mandates. In their motion for summary judgment, the Plaintiffs fail to cite to any part of the record to support their various contentions for summary judgment. Plaintiffs set forth eight numbered paragraphs as their undisputed material facts, yet they fail to cite to the record for any of these factual propositions. In the absence of any evidence to support their motion, Plaintiffs fail to demonstrate that they are entitled to summary judgment on any of their claims. In their rebuttal brief, Plaintiffs proffer that their miser motion for summary judgment was the result of Plaintiffs taking into account that the Court had established a briefing schedule for cross-motions for summary judgment and that they wanted to avoid burdening "the Clerk's Office and the law clerks with having voluminous sets of documents on Cross-Motions for Summary Judgment." (Pls.' Rebuttal at 1.) However, Plaintiffs should be mindful that the Court is the one that decides when it will grant a party leave to file or submit a pleading outside the schedules and rules established under the Federal Rules of Civil Procedure; in this particular instance, the Court did not grant the Plaintiffs discretion to determine on their own if they would comply with the federal rules. Thus,

the Court denies Plaintiffs' motion for summary judgment because Plaintiffs fail to set forth any evidence that there are no disputed material facts; furthermore, Plaintiffs fail to establish that they are entitled to judgment as a matter of law.

III. CONCLUSION

The Court grants summary judgment in favor of the Defendants as to all counts. Plaintiffs fail to present a claim for either negligence per se or common law negligence because they fail to establish the duty that the Defendants owed, proximate causation, or any damages or injuries. Defendants are entitled to summary judgment on the implied warranty of habitability claim because the law of the case has established that there is no implied warranty of habitability between a landlord and a tenant. Furthermore, Plaintiffs fail to establish a claim for conversion because they are unable to show either how the Defendants have exercised rights over their chattels to their exclusion or how the mold in the apartment had deprived them of their right to the chattel. Defendants are entitled to summary judgment on Plaintiffs' claim for punitive damages because the Court had previously ruled that the Plaintiffs' initial Motion for Judgment had failed to set out sufficient facts to support a claim for punitive damages and Plaintiffs' Second Amended Complaint does not cure these deficiencies. Finally, the Court denies Plaintiffs' motion for summary judgment because of its procedural deficiencies and because of Plaintiffs' failure to demonstrate that there are no genuine issues of material fact in dispute and that they are entitled to judgment as a matter of law. From the foregoing, it is hereby

ORDERED that Defendants, Lincoln Property Company's and the State of Wisconsin Investment Board Investment Company's, Motions for Summary Judgment are GRANTED as to all counts. It is further

ORDERED that Plaintiffs, Christophe and Juanita Roche's, Motion for Summary Judgment is DENIED.

The Clerk is directed to forward a copy of this Memorandum Order to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT PROPERTY,
Defendants.

[Filed July 25, 2003]

JUDGMENT

Pursuant to the order of this Court entered on July 25, 2003, and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the defendants, Lincoln Property Co. and SWIB Investment Co., and against plaintiffs, Christophe Roche and Juanita Roche.

Elizabeth H. Paret, Clerk

By: /s/ [illegible]
Deputy Clerk

Alexandria, Virginia
July 25, 2003

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants, Lincoln Property Company's ("Lincoln") and the State of Wisconsin Investment Board's ("SWIB"), motions to bar the testimony by Richard Bernstein, M.D., and for summary judgment on all claims for personal injury. This case concerns Plaintiffs Christophe and Juanita Roche's claim for personal injuries stemming from exposure to alleged toxic levels of mold in their apartment. The Roches contend that Defendants negligently failed to properly maintain their apartment and allowed toxic levels of mold to develop, causing the Roches and their family to suffer respiratory and other medical problems. The issue before the Court is whether Dr. Bernstein's testimony regarding the proximate cause of the Plaintiffs' personal injuries, allegedly resulting from exposure to toxic levels of mold, satisfies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. For the reasons stated herein, the Court concludes that Dr. Bernstein's testimony lacks, as to the proximate cause of Plaintiffs' personal injuries, a methodology satisfying *Daubert* because: (1) Dr. Bernstein failed to adhere to the established methodology of differential diagnosis by not ruling in the suspected causes and by not ruling out other possible causes; (2) he failed to establish why various reports and studies showing some correlation between exposure to mold and allergic reactions support his conclusions that the mold in the apartment was the proximate cause of Plaintiffs ailments, and (3) he relied solely on temporal relation to arrive at his conclusions.

I. BACKGROUND

Christophe and Juanita Roche and their children lived in an apartment at Westfield Village from April 2001 to March 2002. The Roches claim that their apartment was poorly maintained, that there were water leaks, holes in the wall, and mold growing within the apartment. The Roches contend that, as a result of being exposed to toxic levels of mold, they currently suffer respiratory and other ailments.

Plaintiffs leased their apartment from SWIB. Lincoln managed the Westfield Village Apartments in Centreville, Virginia. Plaintiffs complained to Lincoln on several occasions about the poor condition of their apartment. Plaintiffs complained of water leaks needing repair, of holes that had been cut in the wall, of the carpet being torn up, and of "the fact that mold was all over [the] apartment." (Compl. ¶ 17.) Plaintiffs allege that toxic levels of mold developed within the apartment due to moisture damage from the leaky fixtures and plumbing. In February 2002, Plaintiffs engaged a consultant, Ronald G. Ginste of Potomac Environmental Testing Services, to conduct testing for the presence of mold in the apartment, and the consultant discovered that there was "extensive" mold contamination in the apartment. (*Id.* ¶ 28.) Specifically, Mr. Ginste found several types of molds present in

the apartment: Stachybotrys, Cladosporium, Penicillium, Aspergillus, Smuts, Hyphal elements, and epicoccum.

Subsequent to leaving the apartment in March 2002 and after having filed this action, Plaintiffs sought treatment from Dr. Bernstein, an allergist. Mr. Roche complained of memory loss, chronic headaches, sinus problems, mild hypersensitivity to smells, and chronic nasal stuffiness. (Defs.' Mem. Supp., Ex. D. at 2.) Mrs. Roche complained of memory loss, chronic upper respiratory sinus symptoms, some chest congestion, and shortness of breath. (*Id.* at 4.) Dr. Bernstein first examined the Plaintiffs on December 24, 2002. After his initial examination, Dr. Bernstein wrote to the Plaintiffs stating that he believed they were dealing with two health issues: first, the allergenic effects of the molds to which the Plaintiffs were exposed, primarily Cladosporium and Aspergillus; second, sick-building symptoms "which were probably secondary to the mycotoxic effects of the Stachybotrys, which can also be seen with Aspergillus." (*Id.* at 1.) Dr. Bernstein recommended that Mr. Roche stop smoking, that the Roches find a new home for their cat, and that they start a low-sugar diet. (*Id.*) In his inter-office report, Dr. Bernstein noted that Mrs. Roche had a history of asthma. (*Id.* at 4.) Dr. Bernstein scheduled the Plaintiffs for allergy testing. (*Id.* at 3, 5.)

On February 12, 2003, the Plaintiffs presented themselves for allergy testing through skin endpoint titration. Dr. Bernstein found that Mr. Roche was allergic to several common allergens found in Northern Virginia; however, Mr. Roche was not allergic to the molds found in the apartment – namely Aspergillus, Cladosporium, or Penicillium. (Bernstein Dep. at 14:9-20:9.) Mr. Roche was allergic to mites, cockroaches, cats, dust, most weeds and grasses he was tested for, and all trees in the test. In addition, Mr. Roche smoked about 8 cigarettes per day, and the family owned a cat. Dr. Bernstein repeated his prior recommendation that Mr. Roche stop smoking because

smoking is a "nonspecific irritant" which makes allergic symptoms worse. (*Id.* at 20:10-21:11.) He restated his recommendation that Mr. Roche find a new home for the cat. (*Id.* at 20:10-12.) As to Mrs. Roche, Dr. Bernstein found that she was allergic to most allergens, including the molds Aspergillus, Cladosoporim, and Penicillium. (*Id.* at 21:12-23:7.) Mrs. Roche was also allergic to cats. Dr. Bernstein also recommended that Mrs. Roche get rid of the cat. (*Id.* at 23:11-21.) Dr. Bernstein, however, performed no testing addressing the Plaintiffs' reaction to Stachybotrys because Dr. Bernstein does not consider Stachybotrys to be an allergen. (*Id.* at 26:20-27:9.)

The Scheduling Order in the case required that the Plaintiffs designate expert witnesses pursuant to Federal Rule of Civil Procedure 26 and to comply with the other mandates of the statute by December 15, 2002. *See* Fed. R. Civ. P. 26(a)(2). On December 27, 2002, the Plaintiffs designated Dr. Bernstein as one of three experts; Plaintiffs failed to provide any of the required disclosures under Rule 26(a)(2), i.e., the expert report. Defendants moved to bar Dr. Bernstein's testimony based on Plaintiff's failure to submit a Rule 26 report. Magistrate Judge Sewell denied the motion because he found that Dr. Bernstein was a treating physician under *Hall v. Sykes*, 164 F.R.D. 46 (E.D. Va. 1995), and, therefore, exempt from the expert report requirement. Thus, Plaintiffs did not need to submit a report to the extent that Dr. Bernstein was going to testify about his treatment of the Plaintiffs.

Defendants now bring two motions. First, Defendants seek to exclude Dr. Bernstein's testimony as to specific causation for both Plaintiffs for failure to adhere to the principles enunciated in *Daubert* because Dr. Bernstein "has no appropriate methodology to opine that molds in the apartment contributed to any health problems." (Defs.' Mem. Supp. at 1 .) Defendants contend that Dr. Bernstein has failed, as part of his differential diagnosis, to rule-in Stachybotrys as one of the molds that caused

Plaintiffs' injuries. Furthermore, Dr. Bernstein failed to rule-out, as to both Plaintiffs, the other commonly found allergens as potential causes for Plaintiffs' injuries. Defendants also claim that Dr. Bernstein has failed to rule-in Aspergillus, Cladosporirum, and Penicillium as causes for Mr. Roche's injuries because Mr. Roche did not react to these three molds. In response, Plaintiffs contend that Dr. Bernstein's conclusion that their symptoms were caused by exposure to molds is supported by his findings. Mainly, Dr. Bernstein found that the Plaintiffs were asymptomatic when they arrived at the Westfield Village apartment. Dr. Bernstein also referred to literature relating to Stachybotrys and sick-building syndrome he had read and on his previous experience with sick-building syndrome patients. Dr. Bernstein also relied on Mr. Ginste's report on the air sampling of the Roches' apartment, which broke down the specific levels of the various molds found throughout the apartment; and he relied on the P. K. Jarvis Toxin Report, which indicated the types of toxins that were present and produced by the Stachybotrys in the Roches' apartment. Defendants' second motion, in the alternative, is for summary judgment. Defendants contend that the Plaintiffs lack sufficient causation because Dr. Bernstein has stated that there were many possible causes for Plaintiffs' allergic reactions.

The Court heard oral argument on the motions on April 2, 2003; the matters were taken under advisement. The Court reviewed the record, the parties' arguments, and the relevant case law; on April 16, 2003, the Court issued an Order granting the motion to exclude Dr. Bernstein's testimony for the reasons to be stated in a subsequent memorandum opinion. Although both motions are before the Court, this Memorandum Opinion addresses only the motion to bar Dr. Bernstein's testimony. The Court addresses the motion for summary judgment in a separate order addressing the parties' cross-motions for summary judgment on all remaining claims.

II. DISCUSSION

A. Standard of Review

The Federal Rules of Evidence provide the Court with the power to determine any "preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence . . . ." Fed. R. Evid. 104(a). In determining the admissibility of expert testimony, the Court relies on Federal Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Glossing on Rule 702, the United States Supreme Court emphasized that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Thus, conjecture or "subjective belief" or "unsupported speculation" will not suffice. *See id.* at 590. In performing this "gatekeeping" task, the Court must make a preliminary assessment of "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Courts generally consider four factors in determining whether the theory or technique is "scientifically valid": (1) whether the theory or technique used by expert can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used; and (4) the degree of the method's or conclusion's acceptance

within the relevant scientific community. *Daubert*, 509 U.S. at 593-94; *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995). This list of factors, however, is not exhaustive; courts have considered other factors in assessing whether an expert's testimony is reliable.[1] These factors include: (1) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion[2] and (2) whether an expert has accounted for obvious alternative explanations.[3] As part of the second prong, the Court must determine whether the expert testimony is relevant to an issue in the case. *Daubert*, 509 U.S. at 591-92. While the "scientifically valid" and the "relevance" prongs are distinct in their inception, the two prongs may overlap in a particular case. Thus, "a determination regarding the scientific validity of a particular theory requires not only an examination of the trustworthiness of the tested principles on which the expert opinion rests, but also an analysis of the reliability of an expert's *application* of the tested principles to the particular set of facts at issue." *Cavallo v. Star Enterprise*, 892 F. Supp. 756, 762-63 (E.D. Va. 1995), *rev'd in part on other grounds*, 100 F.3d 1150 (4th Cir. 1996). These are the

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[1] *See* Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendments.

[2] *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); *see also Schmaltz v. Norfolk & Western Ry. Co.*, 878 F. Supp. 1119, 1122 (N.D. Ill. 1995) ("The analytical gap between the evidence presented and the inferences to be drawn on the ultimate issue . . . is too wide in the present case."); *Chikovsky v. Ortho Pharmaceutical Corp.*, 832 F. Supp. 341, 346 (S.D. Fla. 1993) (citing the expert's ignorance of the amounts of Retin-A absorbed by the plaintiff, noting the absence of any established dose-response relationship for Vitamin A and birth defects, and finding that the expert's "analogies to research concerning Vitamin A and other Vitamin A derivatives is [sic] wanting").

[3] *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).

principles that govern the Court's assessment of Dr. Bernstein's opinions.

B. Dr. Bernstein's Testimony

Dr. Bernstein is board certified in internal medicine and pulmonary diseases; however, he is not board certified as an allergist. In his affidavit of March 24, 2003, Dr. Bernstein states:

> I am in a position to state that Mr. and Mrs. Roche were previously healthy but became ill following a mold exposure in the apartment in which they had been living for one year. Mrs. Roche had allergic symptoms as a child, but she had been asymptomatic. Mr. Roche developed problems with chronic headaches and nasal stiffness. Mrs. Roche developed symptoms of shortness of breath, sinus congestion and chest congestion. Allergy testing for Mrs. Roche revealed significant allergies to molds, trees, grasses, pollens and dust mite. Allergy testing for Mr. Roche revealed significant allergies to dust mite, cat, molds, weeds, grasses, and trees.

(Pls.' Mem. Opp'n, Bernstein Aff. ¶ 5.) Dr. Bernstein then concludes that, within a reasonable degree of medical certainty, the Roches' symptoms "were caused by their exposure to molds, and that they became sensitized to molds and developed allergies to molds as a result of living in a contaminated apartment." (*Id.* ¶ 6.) Dr. Bernstein notes that his diagnosis is based on differential diagnosis (*id.* ¶ 7) and that "it is significant that [the Roches] were asymptomatic until they moved into the apartment" (*id.* ¶ 6). To form his opinion, Dr. Bernstein relied on: (1) the medical history relayed by the Roches on December 24, 2002 (*id.* ¶ 5); (2) the past medical records, which had been sent to Dr. Bernstein the day before the deposition on February 26, 2003 (*id.* ¶ 1); (3) blood test results, CAT scan results, MRI results, and X-rays (*id.* ¶ 2); (4) a literature review regarding Stachybotrys; (5) the P.K. Jarvis Toxin Report, indicating the type of toxins that were

present and produced by the Stachybotrys in the Roches' apartment (*id.* ¶ 3); (6) the skin endpoint titration testing (*id.* ¶ 5); (7) the RAS Test for Stachybotrys that was performed on the Roches' blood sample (*id.* ¶ 6); and (8) the certified industrial hygienist's – Mr. Ginste – report on the types and quantities of molds found in the Roches' apartment on February 24, 2002.

Although Dr. Bernstein makes his conclusion "within a reasonable degree of medical certainty," his conclusion is vague and generalistic, as it fails to distinguish between harms attributable to the mold exposure and the Roches' allergic reactions to other common allergens, such as cats, dust mites, weeds, grasses, and trees. This omission is fatal to Dr. Bernstein's conclusion and to his methodology of differential diagnosis; the omission is also significant because the Roches may only recover for specific injuries directly attributable to their exposure to the mold found in the apartment. This omission also precludes recovery for symptoms related to the Roches' sensitization to molds – i.e., how exposure to the molds in the apartment injured the Roches in such a way as to render them more susceptible to such symptoms.

C. Analysis

As an initial procedural matter, Plaintiffs proffered Dr. Bernstein to Magistrate Judge Sewell as a "treating physician." However, a review of Dr. Bernstein's deposition, his affidavit which amplifies and contradicts his deposition, and his supplemental report demonstrates that Plaintiffs have expanded Dr. Bernstein's expertise and opinions well within the role of a testifying expert without complying with the Court's Scheduling Order or Federal Rule of Civil Procedure 26. Thus, the Court analyzes Dr. Bernstein's testimony as a testifying expert and not as a treating physician. The Court finds that Dr. Bernstein's testimony is inadmissible because Dr. Bernstein is unable to establish, through any acceptable methodology, that the Plaintiffs were injured by the mold allegedly

contained within their apartment. The Court concludes that Dr. Bernstein's testimony is based on conflicting facts, conflicting reports and literature, fails to rule-in and rule-out several potential allergens, and relies solely on temporal relation; thus, his differential diagnosis is unsupported and unreliable.

1. The Methodology

If scientifically valid, Dr. Bernstein's testimony would clearly be admissible as to causation because it would show that the Roches' exposure to the molds in the apartment caused their illnesses. Thus, the Court focuses its analysis on the scientific validity test under *Daubert*. The Court specifically focuses on the reliability of the methodology employed by Dr. Bernstein and on his adherence to, and application of, that methodology. In his affidavit, Dr. Bernstein states he employed a differential diagnosis methodology to arrive at his conclusion[4]; thus, Dr. Bernstein should have ruled in the various molds that the Roches were exposed to at their apartment, and he should have ruled out all other potential causes to determine that the Roches' injuries were proximately caused by these molds – or at least that the molds aggravated their previous conditions. If faithfully applied, the methodology of differential diagnosis "has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (quoting *Brown v. Southeastern Penn. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.)*, 35 F.3d 717, 758 (3d Cir. 1994)). Dr. Bernstein determined from a review of the Roches' medical history, from their blood test results, CAT scan results, MRI results, and X-rays, from a literature review regarding Stachybotrys, from the P.K.

[4] Differential diagnosis is "a process whereby medical doctors experienced in diagnostic techniques provide testimony countering other possible causes . . . of the injuries at issue." *Hines v. Consolidates Rail Corp.*, 926 F.2d 262, 270 n. 6 (3d Cir. 1991).

Jarvis Toxin Report, from the skin endpoint titration testing, from the RAS Test for Stachybotrys, from the certified industrial hygienist's report, and from the timing of their exposure to the molds in their apartment in relation to their development of symptoms that the Roches' exposure to the molds caused their illnesses.

Dr. Bernstein's differential diagnosis is important to determine specific causation.[5] In this case, the specific causation issue is whether Stachybotrys, Penicillium, Aspergillus, and Cladosporium caused the Roches' symptoms and, more specifically, how each of the molds contributed to the Roches' symptomology. A reliable differential diagnosis typically, though not invariably, is performed after "physical examination, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is most likely. *Westberry*, 178 F.3d at 262. "A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion." *Id.* at 265; *see also Cavallo*, 892 F. Supp. at 771 ("If other possible causes of an injury cannot be ruled out, or at least the probability of their contribution to causation minimized, then the 'more likely than not' threshold for proving causation may not be met.").

Dr. Bernstein's differential diagnosis, however, is scientifically invalid and unreliable. First, Dr. Bernstein fails to rule in the molds found in the apartment – specifically Aspergillus, Clasoporium, and Penicillium – as possible causes for Mr. Roche's allergy and flu-like symptoms

[5] In their Memorandum in Support, Defendants acknowledge that the some molds can generally cause allergic reactions – general causation. The issue is Plaintiffs' lack of specific causation.

because Mr. Roche was not allergic to these molds. Second, Dr. Bernstein did not conduct any testing concerning the Roches' susceptibility to Stachybotrys. He notes, however, that the RAS Test for Stachybotrys that was performed on the Roches' blood samples was inconclusive (Bernstein Aff. ¶ 6), although that test revealed that the Roches had not built up antibodies to Stachybotrys (Defs.' Mem. Supp. Ex. F, Ronald E. Gots Dep. 128:1-15).[6] Third, Dr. Bernstein's reliance on the industrial hygienists report is misplaced because Mr. Ginste, in the report, notes that "the severity of exposure is difficult to estimate" and that "no direct link between [the Roches'] health complaints and their exposure can be shown through the methods of this investigation . . . ." (Bernstein Dep. Ex. 1, Mold Investigation Report 5111 Woodmere Dr., Unit 104, 3/17/02 (hereinafter "Mold Investigation Report") at 6.) Furthermore, Dr. Bernstein is not a toxicologist and admitted to lacking any knowledge of the levels required for these various molds to become toxic or of the levels required for the molds to affect the Roches. Thus, he is unable to establish a direct nexus between the levels of exposure to the mold and any subsequent illnesses that overcame the Roches. Fourth, Dr. Bernstein's reliance on articles concerning Stachybotrys and other molds and their effects on humans is erroneous because most of those and other articles state that there are no standards as to what quantity of mold is acceptable in indoor environments with respect to health and that establishing a

[6] In its report on the RAS Test results, Quest Diagnostics notes that the RAS Test has not been cleared or approved by the FDA. Quest Diagnostics further explains that

> "[i]n those patients who have symptoms and physical findings of hypersensitivity pneumonitis ["HP"], the presence of elevated IgG and IgA responses to a mold can be used to support the diagnosis of HP. In the absence of these clinical findings, the IgG and IgA antibody responses only indicate prior exposure [to an] immonuchemically-related fungi."

(Defs.' Mem. Supp. Ex. F, Gots Dep. Ex. 3, 4.)

direct link between mold exposure and health problems is difficult because individuals have different sensitivities to molds. Fifth, Dr. Bernstein fails to state how the "extreme immune inhibitors" produced by the Stachybotrys found in the Roches' apartment and tested at the P.K. Jarvis laboratory proximately caused the Roches' ailments.

Sixth, Dr. Bernstein fails to rule out the Roches' significant allergies to cats, dust mites, grasses, weeds, and trees as potential causes for the Roches' symptoms. Seventh, as to his conclusion that the Roches became sensitized by their exposure to the molds in the apartment, Dr. Bernstein stated in his deposition that it would not be possible to make a determination of sensitization unless the Roches had been tested for allergies prior to moving into the apartment. (*See* Bernstein Dep. 33:7-20.) Eighth, Dr. Bernstein fails to address how his consideration of the blood test results, the CAT scan results, the MRI results, and the X-rays contributed to his determination that the Roches' symptoms came about as a result of their exposure to molds. Ninth, Mrs. Roche's medical history, as relayed by her to Dr. Bernstein, reveals that she had been to the emergency room on several occasions with similar symptoms prior to her moving into the Westfield Village apartment. Thus, Dr. Bernstein's own office files contradict his conclusion that Mrs. Roche was asymptomatic prior to her arrival at the apartment. Tenth, Dr. Bernstein's reliance on temporal causation as the determinative factor in his analysis is suspect because "it is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore insufficient to satisfy the requirements of [Rule] 702." *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F. Supp. 1119, 1122 (N.D. Ill. 1995). The following is a thorough discussion of the Court's findings and conclusions as to Dr. Bernstein's testimony.

2. Differential Diagnosis

As previously stated, a reliable differential diagnosis must rule in the suspected cause of an injury and rule out other causes or determine which of the remaining explanations is most likely the cause. In order to support his conclusion – that the Roches' symptoms were caused by their exposure to molds and that the Roches became sensitized to molds and developed allergies to molds as a result of living in the apartment, Dr. Bernstein must rule in the suspected molds and rule out other allergens that could potentially cause the Roches' symptoms. Dr. Bernstein has failed to do so in this case, and his differential diagnosis fails to meet the requirements, under *Daubert*, of a scientifically valid methodology.

a. <u>The Medical Tests</u>

Based on the results of the skin endpoint titration testing, it is undisputed that the Roches were allergic to multiple allergens. Mr. Roche was allergic to all weeds tested (Lambs Quarters, Wormwood Sage, S. Ragweed, E. Plaintain, Sheep Sorrel, and Pigweed), to Bermuda and Timothy grasses, to all trees tested (Elder, Sycamore, Cottowood, Oak, Ash, Hickory, Birch, and Elm), to several organisms (Farinae Mite, Cockroach, Cat, and Pt. Mite), to A. Dust and to a few molds (Alternaria, Candida, and Stemphylium).[7] Significantly, the skin endpoint titration

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[7] Dr. Bernstein explains the Skin endpoint titration testing:

> [B]asically, we're using serial delusions [sic] so everything is a 5th dilution, your concentrate is a 1 to 20 dilution, and so a No. 1 would be 1 to 100 dilution, a No. 2 would be a 1 to 500 dilution, a No. 3 would be a 1 to 2500 dilution, a No. 4 dilution . . . 1 to 125000 dilution . . . and so classically what you do is, start off testing at a relatively low concentration, which we all ready [sic] start off at number 6s, which is a 1 to 325,000 dilution because you don't want anyone to have an adverse reaction from the testing; and then you progressively work your way up, and when you get a 7 millimeter wheel that is generally considered

test included Aspergillus, Hormodendrum (hereinafter "Cladosporium"), and Penicillium (three of the molds found in the Westfield Village apartment); however Mr. Roche was not allergic to these three molds. Mrs. Roche was also allergic to a host of allergens including weeds (Wormwood Sage, E. Plaintain, and Pigweed), Bermuda and Timothy grasses, trees (Elder, Cottonwood, Ash, Hickory, and Elm), all organisms tested (Farinae Mite, Cockroach, Cat, Dog, and Pt. Mite), A. Dust, Feathers, and most molds tested (Candida, Cladosporium, Mucor, Penicillium, Stemphylium, Aspergillus, Helminthosporium, Fusarium, Epidermatophyton, and Pullularia). Therefore, as to Mr. Roche, Dr. Bernstein could not objectively rule in Aspergillus, Cladosporium, or Penicillium as potential causes for Mr. Roche's chronic headaches or nasal stiffness. As to Mrs. Roche, Dr. Bernstein could rule in the three molds Aspergillus, Cladosporium, and Penicillium since she reacted to these molds.

b. Ruling in Stachybotrys

The Mold Investigation report revealed that Stachybotrys was also present within the Roches' apartment; however, from his testing, Dr. Bernstein is unable to rule in Stachybotrys as a potential cause. Dr. Bernstein did not directly test the Roches for a reaction to Stachybotrys. Dr. Bernstein admitted to performing no test regarding Stachybotrys because he does not consider Stachybotrys as an allergen. (Bernstein Dep. at 26:20-27:9.) On the other hand, the Roches had undergone laboratory testing which revealed that neither Mr. nor Mrs. Roche had developed antibodies to an immonuchemically-related fungi. (*See* Gots Dep. Ex. 3.) Plaintiffs contend that they could not have undergone direct testing for reactions to Stachybotrys because Stachybotrys produces micotoxins, which

positive as indicative of the person having an allergic reaction to that substance that you're testing.

(Bernstein Dep. at 6:10-7:3.)

are essentially poisons. (Pls.' Mem. Opp'n at 5-6.) They further maintain that the previous Stachybotrys testing was inconclusive because the test is based on finding the antibody to Stachybotrys and that the human body takes considerable time to build such an antibody. (*Id.* at 6.) Furthermore, they contend, the test is not FDA approved. Even accepting Plaintiffs' arguments that the Stachybotrys test is inconclusive, Dr. Bernstein could not reasonably rule in Stachybotrys because (1) Dr. Bernstein is an allergist – not a toxicologist, a microbiologist, or an industrial hygienist – and he does not consider Stachybotrys an allergen, (2) he performed no test as to the Roches' sensitivity to Stachybotrys, and (3) the one test that was performed on the Roches' blood revealed that they had not built up any antibodies to Stachybotrys. Thus, Dr. Bernstein, in the absence of objective medical findings, rules in Stachybotrys as a potential cause for the Roches' illnesses and bases his reasoning on several articles he read prior to, and subsequent to, his deposition, on his prior experience with other patients who have been exposed to Stachybotrys, and on his experience with patients suffering from "sick-building" syndrome.

c. A Toxicologist's Methodology

Although not addressed by either party in their multiple briefs, the Court finds that Dr. Bernstein's next step was to determine whether the particular molds could have caused the Roches' injuries – that is, whether the Roches' exposure to the specific levels of molds found in the apartment could have actually caused their injuries. Thus, although Dr. Bernstein is not a toxicologist, he must nonetheless apply the principles and methods of toxicology if he is to give an opinion on an issue relating to that specialty.[8] *Cavallo*, 892 F. Supp. at 771-72. In

[8] In analyzing whether a particular level of exposure to mold caused the Roches' illness, Dr. Bernstein is considering principles in immunology. However, in the absence of other standards argued by the parties,

Cavallo, the court addressed the methodology adopted for toxicologists, used by the toxicology expert in that case and endorsed by the World Health Organization, the National Academy of Sciences, and various agencies of the United States Government. *Id.* at 764. That methodology requires that:

> First, an evaluation is made of the [molds] to which the individual might have been exposed, and of the concentrations of these [molds] in air breathed by the individual. The second step involves an evaluation, based on the published scientific literature, of the exposures necessary to produce the adverse effects associated with the [molds] to which the individuals may be exposed. These two evaluations are then combined in the final step of the risk assessment to provide an estimate of the likelihood that any of the harmful properties of any or all of the [molds] might have been expressed in the exposed individual.

Id. In his affidavit, Dr. Bernstein fails to set forth any of these findings with any specificity; however, considering the record, the Court concludes that Dr. Bernstein lacks any knowledge of the levels of exposure to mold required to manifest any symptoms. Furthermore his reliance on several articles, addressed in his deposition, is misplaced because those articles and others, which have become part of the record, reveal that there are no quantitative standards or guidelines for assessing whether the mold contamination in an area is acceptable or not. Dr. Bernstein's reliance on his anecdotal experience to form a conclusion as to specific causation is unfounded because his anecdotal experience is not based on the methods of science. Thus, Dr. Bernstein's inclusion of the various molds lacks scientific support and is suspect.

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the Court finds the toxicology methodology addressed in *Cavallo* instructive.

i. *Mold Evaluation*

The results of the test of the Roches' apartment, conducted by Potomac Environmental Testing Services ("PETS") using "wipe sampling," "bulk sampling," "Burkard air sampling," and 'Anderson air sampling" form a building block in the first step of the analysis. From the bulk sampling, PETS found 3,920,000 colony forming units per gram (cfu/g) of Stachybotrys within the HVAC closet ceiling, 40,000 cfu/g of Cladosporium and 40,000 cfu/g of Penicillium. Inside a duct from the HVAC unit, PETS found 1,027,000 cfu/g of Penicillium and 156,000 cfu/g of Cladosporium. As a result of the Burkard air sampling, PETS found 1,056 spores per cubic meter (spores/m^3) of Stachybotrys in the living room – compared to 0 spores of Stachybotrys found in the outdoor patio. They also found 308 spores/m^3 of Cladosporium within the living room and 22 spores/m^3 in the outdoor patio. Using the Anderson Air Sampler, PETS found 627 colony forming units per cubic meter (cfu/m^3) of Stachybotrys within the living room and none in the outdoor patio. PETS also found 179 cfu/m^3 of Aspergillus in the living room and none in the outdoor patio. They further found 141 cfu/m^3 of Cladosporium within the living room and 237 cfu/m^3 in the outdoor patio. As a result of their analysis of the wipe-samples, PETS found 10,010 colony forming units per square inch (cfu/in^2) of Penicillium within the HVAC closet drain pan and 93,600 cfu/in^2 within the linen closet. PETS also found 31,200 cfu/in^2 of Aspergillus within the linen closet and 14,030 cfu/in^2 in the front bathroom – of which 2,070 cfu/in^2 were Aspergillus versicolor. Finally, PETS found 3,901 cfu/in^2 of Stachybotrys in the front bathroom.

ii. *Literature Review*

Dr. Bernstein lacks personal knowledge of what levels of exposure are considered toxic or dangerous to human health, or even what levels of exposure trigger allergic reactions. (Bernstein Dep. at 76:20-77:4.) Furthermore,

Dr. Bernstein is not a toxicologist, nor has he received any training in toxicology. (*Id.* at 65:8-11.) Dr. Bernstein relies solely on published articles to form an opinion that exposure to the specific levels of Stachybotrys causes cognitive injuries, that Aspergillus causes both cognitive injuries as well as allergic reactions, and that Penicillium and Cladosporium cause allergic reactions. Although Dr. Bernstein finds support in the literature for his conclusion that Aspergillus, Cladosporium, Penicillium, and Stachybotrys can cause the Roches' symptomology, he fails to provide any scientifically valid basis to support his leap from these articles to his conclusions on specific causation.

As stated in his deposition testimony, Dr. Bernstein relied upon several articles and statements to form his opinions on proximate causation in this case. Dr. Bernstein references articles in the *Journal of Asthma* and in *Clinical Toxicology* for the proposition that Stachybotrys caused the Roches' cognitive injuries, such as chronic headaches, memory loss, and perhaps hypersensitivity to smells and that molds caused the Roches' allergies and respiratory illnesses. (*Id.* at 35:6-36:12.) In the article from the *Journal of Asthma*, the authors discuss several studies, from various locations, which have investigated the links between molds, specifically Stachybotrys, and health related symptoms. *See* Massoud Mahmoudi & M. Eric Gershwin, *Sick Building Syndrome, III., Stachybotrys chartarum*, 37 Journal of Asthma 2, at 191-98 (2000). The authors note that the presence of fungi in a home does not imply illnesses; nonetheless, "fungi have been associated with human-related illnesses." *Id.* at 196. The authors, however, conclude that it is difficult to prove an association between Stachybotrys and other microorganisms and health-related symptoms because "[t]he respiratory symptoms as well as other complaints of the patients may be due to a combination of dampness, pollution such as dust, fumes and smoke, and prolonged exposure including inhalation of mycotoxins from S. chartarum and/or

other microorganisms." *Id.* at 197. They also suggest further detailed case studies and that "a suitable animal model should be found for testing." *Id.* The authors do not discuss whether a particular level of exposure has led to symptoms – they refer to general causation (which is not at issue in this case). The authors discuss specific levels of exposure in their discussion of a link between Stachybotrys and pulmonary hemorrhage / hemosiderosis in infants. This injury, however, is not at issue in this case, and Dr. Bernstein does not address it in his findings. Thus, the Journal of Asthma article does not provide any information which is helpful in the second step of the toxicology methodology.

Dr. Bernstein also references an article from *Clinical Toxicology*. *See* Eckardt Johanning, *Stachybotrys Revisited*, 36 Clinical Toxicology 6, at 629-31 (1998). The letter from Dr. Johanning to the editor addresses a previous study which included a control group of twenty-one individuals with similar demographics and environmental history, except for employment in the problem building and exposure to Stachybotrys fungi. *Id.* at 629. The study was initiated after several employees reported to the Mount Sinai Medical Center with medical problems. *Id.* Several of these employees, either through direct physical contact with moldy materials or by working in the locations with the highest airborne Stachybotrys levels (from 116 to over 2,000 cfu), were diagnosed with chronic laryngitis, sinusitis, bronchitis, asthma, and allergy. *Id.* Although this link is significant, the author concludes that "[c]hronic, low to moderate level inhalation exposure has not been systematically studied and documented in the past." *Id.* at 630. He also states that indoor environmental exposures fluctuate inhalation doses over time, that there is a "lack of simple, reliable exposure indicator or a Stachybotrys disease biomarker," and that isolating exposure to Stachybotrys is difficult because Stachybotrys is generally found with other molds such as Penicillium and Aspergillus, of which there are several

hundred species with very different properties, mycotoxins, and allergenic potency. *Id.* Thus, the author acknowledges that no definable standard exists for determining whether an individual will react to exposure to various levels of different molds. This article does not provide Dr. Bernstein with any scientific basis as to specific causation – at best the article addresses only general causation.

At his deposition, Defendants questioned Dr. Bernstein on two articles that they forwarded to him prior to the deposition: an article from the National Center for Environmental Health ("NCEH") for the Center for Disease Control and Prevention ("CDC") and an article from the American College of Occupational and Environmental Medicine ("ACOEM"). The NCEH article, *What Are Molds . . .* , provides general information about various molds and their effects on human health. (*See* Bernstein Dep., Ex. 7.) The article states that some people are sensitive to molds, and that for those people, exposure to mold "can cause symptoms such as nasal stuffiness, eye irritation, or wheezing." *Id.* The article, however, summarizes that "Stachybotrys chartarum and other molds may cause health symptoms that are nonspecific. At present there is no test that proves an association between Stachybotrys chartarum and particular health symptoms." *Id.* Thus, this article, like the previous ones discussed herein, provides information only as to general causation – not specific causation. Nor does the article provide any data that medical doctors may use to determine whether their patients are suffering from exposure to molds or whether they are suffering from their allergies to pollen.

The article by the ACOEM also addresses general causation only and further undermines Dr. Bernstein's conclusions as to Plaintiffs' suffering from sick building syndrome. Bryan D. Hardin, *et al., Adverse Human Health Effects Associated with Molds in the Indoor Environment,*

ACOEM Evidence-based Statement of October 27, 2002. That articles provides:

> Residential or office fungal exposures may be a substantial factor in an individual's allergic airway disease depending on the subject's profile of allergic sensitivity and the levels of indoor exposures. Individuals with this type of mold allergy are "atopic" individuals, ie., have allergic asthma, allergic rhinitis [hay fever], or atopic dermatitis and manifest allergic (IgE) antibodies to a wide range of environmental proteins among which molds are only one participant. These individuals generally will have allergic reactivity against other important indoor and outdoor allergens such as animal dander, dust mites, and weed, tree, and grass pollens.

Id. at 2. The article also explains that "sick-building" syndrome is a poorly defined set of symptoms which are attributed to occupancy in a building; however, "despite a voluminous literature on the subject, the causal connection remains weak and unproven, particularly with respect to causation by mycotoxins." *Id.* at 4, 6. The article concludes that, despite the ability of Stachybotrys to produce mycotoxins, the multiple studies on the issue have failed to establish a connection between exposure to Stachybotrys and adverse human health reactions. *Id.* at 6. Thus, this article provides no scientific basis for specific causation: it provides no link between exposure to specific levels of specific molds and subsequent illnesses.

The article's statement that the presence of a toxigenic species of mold does not necessarily indicate that mycotoxins are also present[9], provides a basis for questioning

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[9] The article explains:

> Mycotoxins are "secondary metabolites" of fungi, which is to say mycotoxins are not required for the growth and survival of the fungal species ("toxigenic species") that are capable of producing them. The amount (if any) and type of mycotoxin produced is dependent on a complex and poorly understood interaction of

whether mycotoxins existed in the Roches' apartment. *See id.* at 4. This is significant because the P.K. Jarvis report on the cellulose extracted from the Roches' apartment showed the presence of mycotoxins on the cellulose sample. However, the test was perfomed at a laboratory, not at the Roches' apartment; thus, the test results, by themselves, are inconclusive as to whether the Stachybotrys present at the Roches' apartment was actually producing mycotoxins while the Roches lived in the apartment. This further undermines Dr. Bernstein's conclusions.

Although not directly relied upon by Dr. Bernstein at his deposition testimony or in his affidavit, Plaintiffs cite to several articles to support their theory of general causation. As stated previously, general causation is not at issue in this case; however, the articles Plaintiffs reference are significant because they state that there are no established standards to determine whether a particular mold caused a particular injury in an individual – no standards for determining specific causation. Plaintiffs reference the New York City Department of Health and Mental Hygiene's *Guidelines on Assessment and Remediation of Fungi in Indoor Environments* (the "*Guidelines*") for the proposition that molds can cause asthma, hypersensitivity, pneumonitis, allergic rhinitis, dermatitis, runny nose, eye irritation, cough, and congestion, and that "hypersensitivity pneumonitis may occur after repeated exposures to an allergen and can result in permanent lung damage." (Pls.' Mem. Opp'n at 12.) Although Dr. Bernstein has not diagnosed either Mr. Roche or

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factors that probably include nutrition, growth substrate, moisture, temperature, maturity of the fungal colony, and competition from other microorganisms. Additionally, even under the same conditions of growth, the profile and quantity of mycotoxins produced by toxigenic species can vary widely from one isolate to another. Thus, it does not necessarily follow from the mere presence of a toxigenic species that mycotoxins are also present.

Id. at 4.

Mrs. Roche with hypersensitivity pneumonitis, the *Guidelines* support Plaintiffs' theory of general causation; however, the *Guidelines* make clear that whether a particular individual develops symptoms when exposed to molds depends on a variety of factors: "the nature of the fungal material (e.g., allergenic, toxic, or infectious), the amount of exposure, and the susceptibility of exposed persons. Susceptibility varies with the genetic predisposition (e.g., allergic reactions do not always occur in all individuals), age, state of health, and concurrent exposures." New York City Department of Health and Mental Hygiene, *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*, at ¶ 1.1, *available at* http://ww.ci.nyc.ny.us/html/doh/html/epi/moldrptl.html.
"For these reasons, and because measurements of exposure are not standardized and biological markers of exposure to fungi are largely unknown, it is not possible to determine 'safe' or 'unsafe' levels of exposure for people in general. *Id.* The *Guidelines* add that there are no currently available clinical tests to determine the source, place, or time of exposure to fungi or their products. *Id.* at ¶ 1.2. Furthermore, antibody testing is of limited value since individuals are exposed to molds in both outdoor and indoor environments. *Id.*

Another publication by the CDC is a statement by the Chief of the Air Pollution and Respiratory Health Branch for the National Center for Environmental Health at the CDC. Stephen C. Redd, M.D., *State of the Science on Molds and Human Health*, Statement for the Record Before the Subcommittee on Oversight and Investigations and Housing and Community Opportunity, Committee on Financial Services, United States House of Representatives (July 18, 2002). In his statement, Dr. Redd acknowledges that there are many unresolved questions about mold exposures but that "exposures to high levels of molds causes some illnesses in susceptible people." *Id.* at 1-4. Dr. Redd states that the Institute of Medicine ("IOM") has linked airborne molds to allergic rhinitis/

conjunctivitis, allergic asthma, and hypersensitivity pneumonitis and to exacerbations of asthma. *Id.* at 3. Dr. Redd, however, notes that:

> There are no accepted standards for mold sampling in indoor environments or for analyzing and interpreting the data in terms of human health. Molds are ubiquitous in the environment, and can be found almost anywhere samples are taken. It is not known, however, what quantity of mold is acceptable in indoor environments with respect to health. Because of difficulties related to sampling for mold, most studies have tended to be based primarily on baseline environmental data rather than human dose-response data. For these reasons, and because individuals have different sensitivities to molds, setting standards and guidelines for indoor mold exposure levels is difficult and may not be practical.

Id. at 9-10.

Thus, it is undeniable or clear that molds can have adverse health effects on a person; it is also evident from the literature, however, that there are no established standards to determine whether exposure to particular levels of particular molds will trigger an adverse health reaction.[10] In an attempt to correlate a specific level of mold

[10] *See* Pamela J. Davis, *Molds, Toxic Molds, and Indoor Air Quality*, California Research Board Note Vol. 8, No. 1 at 5-6 (March 2001) (stating that it is impossible to set exposure limits for molds that can be applied generally because of the variance in individual sensitivities and because of the vast array of molds (over 100,000) and explaining that

> A comprehensive review of available literature relating to the health effects of mold performed by the Federal-Provincial Working Group on Mycology Air Quality in Public Buildings (a Canadian Government sponsored group) showed that [several population-based studies] have consistently detected an association between respiratory symptoms and home dampness and mould (sic) growth, but causality in these studies has not been established.

found in the apartment with a government standard, Plaintiffs cite to the Occupational Safety and Health Agency ("OSHA") standard that indicates potential contamination in the air when there are 1,000 viable colony-forming units in a cubic meter of air. Plaintiffs cite the OSHA standard as 1,000 particles per cubic meter; however the correct standard is 1,000 colony-forming units in a cubic meter of air. (Defs.' Mem. Reply, Ex. 1.) (emphasis added). Comparing the Mold Investigation Report and the OSHA standard, the Court finds that no measurement exceeds the OSHA standard; therefore, there is no objective evidence of potential contamination.[11] The Court

(internal citations omitted)); N. Carlson, *Mycological Aspects of Indoor Air Quality*, http://www.dehs.umn.edu/iaq/fungus/mycoglos.html *1-*2 (Department of Environmental Health & Safety, University of Minnesota Apr. 29, 1996) (stating that there are no strict numerical guidelines for assessing whether an area is contaminated by mold, and that there are no standards in establishing a link between environmental exposure and the results of an allergy test because "[t]he antigenic material produced by a fungus or a particular genus will vary according to species or a strain within the species and vary with the source of nutrition for the organism"); The American Industrial Hygiene Association, *The Facts About Mold: For the Professional* at *2-*3, *available at* http://www.aiha.org/GovernmentAffairs-PR/html/mold-professional.htm (May 28, 2002) (stating that although dampness in buildings has been associated with respiratory problems, the extent to which mold contributes to this problem is unknown; explaining that there is an almost complete lack of information on specific human responses to well-defined exposures to mold; and concluding that "[u]ntil microbiological methods for demonstrating mold concentrations in the environment are standardized and reproducible, epidemiological studies necessary to determine dose-response can only suggest association, not cause and effect, with respect to mold exposures and health effects"); Berlin D. Nelson, *Stachybotrys chartarum: The Toxic Indoor Mold* at *7, *available at* http://www.apsnet.org/online/feature/stachybotrys (American Phytopathological Society Nov. 2001) (stating that scientists lack information about the relationship between exposure to bioaerosols of Stachybotrys, in quantity and duration of exposure, and the effects on human health).

[11] Notably, PETS found 1,056 spores per cubic meter of Stachybotrys in the living room – not colony forming units. (Mold Investigation Report at 5.) The measurements taken through bulk-sampling were

concludes that Dr. Bernstein offers no documented basis for linking the specific levels of mold found in the apartment to the Roches' symptomology.

iii. *Estimate of the Harm*

For the third step in the analysis, Dr. Bernstein combines the Mold Investigation Report, the literature, his anecdotal experience with patients that have been allegedly exposed to Stachybotrys, and his experience with patients that have suffered from "sick-building" syndrome to arrive at his conclusion on specific causation. (Bernstein Dep. at 92:13-19, 101:18-102:7.) Although PETS conducted the testing within the apartment, they provided no opinion as to how the various levels of exposure related to human health. The PETS report stated:

> While the severity of exposure is difficult to estimate, and no direct link between the occupants' health complaints and their exposure can be shown through the methods of this investigation, consideration should be given to the fact that the occupants' health complaints . . . are all consistent with well-defined case studies of chronic trichothecene intoxication.

(Mold Investigation Report at 6.) Therefore, the Mold Investigation Report provides nothing more than the levels of molds found in the apartment – the Report does not provide Dr. Bernstein with any findings or conclusions as to the severity of the exposure. Moreover, as discussed previously, Dr. Bernstein's reliance on the literature to establish specific causation is misplaced. And, as dis-

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reported as colony forming units per gram, not per cubic meter. (*Id.* at 5.) PETS reported the Anderson air sampling results in terms of colony forming units per cubic meter; however, none of those measurements exceeded the OSHA standard advanced by the Plaintiffs. (*Id.*) Also, PETS reported the wipe-sampling results in terms of colony forming units per square inch, not per cubic meter. (*Id.*) Thus, absent a direct comparison or a conversion table, none of these measurements exceed the OSHA standard.

cussed below, his consideration of anecdotal experiences does not support his opinion on specific causation. Thus, Dr. Bernstein fails to satisfy the third step in the methodology, and his inclusion of the various molds as suspected causes of the Roches' symptoms is not scientifically valid.

Dr. Bernstein testified that he had seen several patients allegedly exposed to Stachybotrys, and that, based on his anecdotal experience, he concluded that the Roches' symptoms were caused by their exposure to Stachybotrys. (*Id.* at 34:13-17, 36:8-20, 45:12-46:1, 54:9-14, 74:19-76:18.) However, Dr. Bernstein fails to explain how the specific exposure to the molds in the Westfield Village are similar in quantity and duration to any of the patients he has examined who have been exposed to Stachybotrys. Dr. Bernstein's position is further undermined by his own testimony; Dr. Bernstein explains his experience with other patients:

> For example, I'm seeing one patient, she has Stachybotrys in her basement, she's completely unaffected has no symptoms, she and her husband have no symptoms at all; in that situation there's no ventilation in the house; in other words, they have baseboard heat, so I think the fact that there's really not much circulation there as we alluded to by Mr. Dean earlier, is the reason why they may not be having symptoms; I'm seeing a large group of patients through another situation, where they were involved in a building that had significant Stachybotrys according to the industrial hygienist; . . . the ventilation is consistent, it's contained in the building, they had some people that were mildly ill, the what happened was they tried to remove the Stachybotrys, . . . ; they aerosolized everything, about 25 people became very ill in the building, and some of them – about 5 or 6 of them with the symptoms similar to the Roche's [sic]; so in that situation I think it's a combination of how much mold is pre-

sent, what are the mycotoxin levels and what's the ventilation system . . ."

(*Id.* at 75:10-76:18.) Dr. Bernstein fails to address the specific levels of exposure and how these levels are tied to his patients' suffering from various illnesses. Dr. Bernstein speculates that the ventilation system makes a difference on whether an individual becomes sick from exposure to Stachybotrys; however, this is merely his hypothesis – not a scientifically supportable conclusion. He further fails to explain why some individuals in the building scenario became mildly ill while others were not ill at all, where the building had constant ventilation. He also does not address the levels of exposure in that case – he merely states that the building had "significant" amounts of Stachybotrys. Dr. Bernstein provides no link between the Roches' specific exposure to molds and his experiences with other patients; he advances merely scientifically unsupported theories – speculations. Dr. Bernstein's anecdotal experience, while valuable to an ongoing study or to research, is not helpful in this instance because it does not support specific causation.[12]

In summary, Dr. Bernstein provides no scientific basis to rule in, as part of a differential diagnosis, the molds found in the Westfield Village apartment. As a result of the skin endpoint titration tests, Dr. Bernstein determined that Mr. Roche was not allergic to Aspergillus, Cladosporium, or Penicillium; thus, these molds cannot be ruled in to the analysis for Mr. Roche's symptomology. Mrs. Roche's skin endpoint titration test revealed that she was allergic to those three molds; therefore, the three molds may be ruled in as the suspected causes for her allergy and asthma symptoms. However, the literature re-

[12] "Where symptoms may be the subject of a variety of causes, it is insufficient for an expert to opine as to the cause of a symptom without some *scientific basis* other than his assertion of general experience." *Cali v. Danek Medical, Inc.*, 24 F. Supp. 2d 941, 951 (W.D. Wisc. 1998) (emphasis added).

lied upon by Dr. Bernstein fails to establish a link between a particular level of exposure and her symptoms; Dr. Bernstein takes a leap of faith and concludes that because general causation exists, then specific causation must also exist, without regard to the levels of exposure. There is no support in the scientific literature for this causation theory. With respect to the Stachybotrys, Dr. Bernstein conducted no testing, dismissed the RAS test as inconclusive, and ruled in the mold based on the literature and on his anecdotal experience. As with the other molds, there is ample evidence, within the literature, that Dr. Bernstein's inclusion of Stachybotrys is rejected by the scientific community as to specific causation. Accordingly, the Court finds that Dr. Bernstein failed to follow the accepted the toxicology methodology in ruling in the various molds as potential causes of the Roches' symptomology.

d. Ruling out Other Allergens

Assuming, arguendo, that Dr. Bernstein properly ruled in the various molds found in the apartment, he fails to rule out any of the other allergens to which the Roches were sensitive. The medical record and the tests performed by Dr. Bernstein suggest that the Roches were allergic to multiple allergens. Therefore, as part of the second portion of the differential diagnosis methodology, Dr. Bernstein must exclude the remaining allergens, or at least minimize the probability of the contribution of the remaining allergens to the Roches' symptomology. *See Cavallo*, 892 F. Supp. at 771.

At his deposition, on February 26, 2003, Dr. Bernstein stated that there were multiple explanations for the Roches' flu-like symptoms: "their allergic respiratory symptoms are multi-factorial of which mold may have been a contributing factor, ..." (Bernstein Dep. at 33:4-6.) Dr. Bernstein admitted, through questioning by Defense counsel, that he was not able to isolate the cause of the Roches' allergic reactions:

Q. When a person has lots of allergies, and then let's say, they're allergic to 15 to 20 things on the sheet that you have in front of you, and they come in with a complaint of nasal congestion; are you as an allergist able to tell which one of those things caused their nasal congestion?

A. No.

Q. Pardon me.

A. No.

Q. So there's (sic) many possibilities that you – You know their (sic) allergic to a lot of things, but you just could never tell which one actually is causing the problem; correct?

A. That's correct.

(*Id.* at 64:1-12.) In response to a question by Plaintiffs' attorney, Dr. Bernstein stated that

> There are a number of explanations which could explain the flu-like symptoms [the Roches] had, they could have had a micoplasma infection, they could have had an Epstein-Barr virus infection, . . . , it could be related to allergic symptoms and chronic mold exposure, it may related to mycotoxic symptoms; it is one of the explanations, I don't have – since not having all of their data at this point, and know all the workup that was done at that time; in other words, if I had seen them at that time, I would have done a workup to make sure that – The diagnosis of making this conclusion that you're asking is one of exclusion; therefore, we need to make sure that we need to exclude; retrospectively it is certainly a possible explanation for the patients' symptoms."

(*Id.* at 107:18-108:10.) On re-direct, Dr. Bernstein once again acknowledges that he had not excluded any of the other possible causes at the time of the deposition. (*Id.* at 133:3-15.) Dr. Bernstein's testimony demonstrates that

he believed there were other causes for the Roches' flu-like symptoms besides mold; he was, at that point, unable to exclude the other allergens.

Dr. Bernstein added that Mr. Roche smoked which is a non-specific irritant making allergy symptoms worse; he instructed Mr. Roche to quit smoking. (*Id.* at 20:15-20.) He also directed the Plaintiffs to get rid of their cat because they were both allergic to cats. (*Id.* Ex. 1.) Dr. Bernstein's position is further complicated by the fact that he examined the Roches nine months after their alleged exposure to the molds in the apartment.

Plaintiffs contend that Dr. Bernstein did not have all the information necessary to exclude all of the other allergens from his differential diagnosis. Even accepting this as true, Dr. Bernstein's affidavit, submitted after he received all of the information and was able to digest the medical records and test results, fails to set forth, in any detail, the factors that supported Dr. Bernstein's ruling out the remaining allergens and leaving the molds found in the apartment as the sole cause of the Roches' symptomology. Dr. Bernstein's testimony is similar to that of the internist in *Ballinger v. Atkins*, 949 F. Supp. 925 (E.D. Va. 1996). In *Ballinger*, the court barred the internist's testimony on *Daubert* grounds because the expert had conceded that there were multiple causes for the plaintiff's memory loss besides the brain damage: "[the internist] includes among those other possible causes sugar intolerance, latent hypoglycemia, psychiatric disorder, bowel disorder or even an intestinal parasite." 947 F. Supp. at 928. Similar to the situation in *Ballinger*, Plaintiffs in this case are allergic to multiple allergens beyond the molds found in the apartment – they are even allergic to their own cat. Dr. Bernstein's differential diagnosis fails to account for these alternate explanations, and the Court finds that his testimony is suspect and unsupported by science.

In addition to failing to exclude obvious alternate causes, Dr. Bernstein fails to set forth any of his findings at his deposition with a reasonable degree of medical certainty. Plaintiffs maintain that Dr. Bernstein's affidavit sets forth his conclusions with the requisite "reasonable degree of medical certainty." However, at his deposition, Dr. Bernstein testified that he lacked any knowledge as to what a "reasonable degree of medical certainty" entailed. (Bernstein Dep. at 53:15-56:9., 89:7-90:2.) In *Ballinger*, the court noted that the internist was unable to present any opinion "with a reasonable degree of certainty." *Id.* The Court finds the present situation similar to that in *Ballinger*: Dr. Bernstein fails to rule out obvious and commonly found allergens, and he fails to set forth any findings with the requisite "reasonable degree of medical certainty." Dr. Bernstein's differential diagnosis is unsupported by the record and is scientifically invalid.

e. Summary

While the methodology of differential diagnosis is scientifically valid, in this instance, Dr. Bernstein has failed to faithfully apply the methodology to the facts. First, Dr. Bernstein does not rule in Aspergillus, Cladosporium, and Penicillium as to Mr. Roche because he was not allergic to these molds. Second, although Mrs. Roche was allergic to Aspergillus, Cladosporium, and Penicillium, Dr. Bernstein's reliance on the literature addressing general causation is misplaced because the literature provides no scientific support for specific causation. Third, Dr. Bernstein did not test the Roches for sensitivity to Stachybotrys, and he dismisses the Stachybotrys test the Roches had previously undergone as inconclusive. Fourth, the literature upon which he relies provides no support for his leap from general causation to specific causation given the specific molds, the specific levels of exposure, and the Roches' medical history. Also, his anecdotal experience is insufficient to support specific causation in light of the authoritative conflicting scientific literature. Fifth, he fails

to properly rule out other allergens and to provide any opinion, at his deposition, with the requisite "reasonable degree of medical certainty."

Dr. Bernstein concludes, in his affidavit, that the Roches became sensitized to molds through their exposure. (Bernstein Aff. at ¶ 6.) His conclusion, however, is belied by the deposition record. During his deposition, Dr. Bernstein testified that it was possible for the Roches to have become sensitized to molds which would contribute to their allergic symptoms; he acknowledged, however, that in order to determine sensitization he would have had to test the Roches for allergic reactions to molds prior to their moving into the apartment. (Bernstein Dep. at 33:7-17.) And, he fails to provide any basis in his affidavit that supports his conclusion of sensitization. Thus, his conclusion as to sensitization is untenable.

In his affidavit, Dr. Bernstein states that he received blood test results, CAT scan results, MRI results, and X-rays on both Mr. and Mrs. Roche. (Bernstein Aff. at ¶ 2.) However, he provides no explanation on how his consideration of these records contributed to his determination that the Roches' symptoms came about as a result of their exposure to molds. The Court concludes that there is no support in the medical record or in the scientific literature for Dr. Bernstein's conclusion as to specific causation: Dr. Bernstein has unjustifiably extrapolated from the medical record and the scientific literature his unfounded conclusion[13] and has failed to account for obvious alternate explanations.[14]

3. Temporal Proximity as the Primary Theory for Proximate Causation

It is clear that Dr. Bernstein does not follow a differential diagnosis methodology in formulating his opinion on

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[13] *See* note 2, *supra*.

[14] *See* note 3, *supra*.

proximate causation in this case. Dr. Bernstein relies primarily upon the temporal relation of the Roches' exposure to the alleged toxic molds to the onset and worsening of their physical problems to reach his opinion on proximate causation. (Bernstein Aff. ¶ 6.) He states that Mr. and Mrs. Roche were asymptomatic prior to moving into the Westfield Village apartment and that "their symptoms were caused by their exposure to molds, and that they became sensitized to molds and developed allergies to molds as a result of living in a contaminated apartment." (*Id.*) The Court finds that Dr. Bernstein's primary reliance is neither supported by the record, nor does it meet the *Daubert* standards.

The record reveals that Mrs. Roche was not asymptomatic prior to her arrival at the apartment. Mrs. Roche suffered from asthma since she was child. (Bernstein Dep. at 31:1-20.) Mrs. Roche visited the emergency room on several occasions complaining of flu-like symptoms before she moved into the apartment: March 4, 2001 (bronchitis), October 14, 1999 (sinusitis), August 26, 1999 (pharangitis), and July 6, 1999 (sinusitis). The Roches moved into the Westfield Village apartment on April 4, 2001. Thus, one month prior to moving into the apartment, Mrs. Roche had suffered from bronchitis – this can hardly be construed as "asymptomatic." In his opinion, Dr. Bernstein fails to provide any explanation as to how he dismisses Mrs. Roche's medical history and concludes that she was asymptomatic prior to April 2001. Dr. Bernstein provides no evidence or testimony as to how exposure to the molds made Mrs. Roche's asthma worse. In addition, he examined the Roches, for the first time, nine months after they had moved out of the apartment. Dr. Bernstein's conclusion that Mrs. Roche was asymptomatic prior to April 2001 is scientifically untenable in light of the record.

An opinion based primarily, if not solely, on temporal proximity does not meet *Daubert* standards. *See Cavallo*,

892 F. Supp. 756. In *Cavallo*, the court opined that "[a]t bottom, [the expert's] opinion is founded primarily on the temporal connection between the spill and the development of Ms. Cavallo's symptoms, as well as on his subjective, unverified, belief that AvJet can cause the types of injuries from which Ms. Cavallo suffers. This is not the method of science." 892 F. Supp. at 773; *see also Schmaltz*, 878 F. Supp. at 1122 ("it is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore insufficient to satisfy the requirements of [Rule] 702"); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1238-39 (D. Colo. 1998) (discussing how temporal relationship itself did not provide evidence of causation); *In re Swine Flu Immunization Prod. Liab. Litig.*, 533 F. Supp. 567, 567 (D. Colo. 1980) (same); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1249 (E.D.N.Y. 1985) (same).

Plaintiffs contend:

> In *Westberry*, [the defendant] claimed that the doctor had no scientific literature on which to rely to "rule in" talc as a possible basis for [plaintiff's] sinus condition, but the Court pointed out that it was undisputed that inhalation of high levels of talc irritates mucous membranes. 178 F.3d at 264. Likewise, in the Roche [sic] case it is undisputed that toxic mold causes the type of injuries that Plaintiffs suffered as set out in all of the Plaintiffs [sic] Memorandums [sic] herein [sic] from the EPA, CDC, etc. [sic] and the [D]efendants' own mold policies. "Further, although Dr. Isenhower did not point to [the plaintiff's] exposure to a specific level of airborne talc, there was evidence of substantial exposure." 178 F.3d at 264. Ginste testified that the [S]tachybotros [sic] levels were extremely elevated, causing the families to be told to immediately evacuate. (Ginste Dep. at 185-86.)

(Pls.' Surrebuttal Mem. at 11.) The Court, however, finds this argument inapposite in light of the facts of this case.

The expert in *Westberry* was the plaintiff's treating physician who had treated the plaintiff prior to his exposure to the talc in question. Also, the treating physician experimented with keeping the plaintiff out of work and noticed that his sinus condition would improve when not working and would worsen when he returned to work. 178 F.3d at 265. In this case, Dr. Bernstein examined and treated the Roches nine months after they left the apartment. He was not treating the patients either prior to their moving into the apartment, or while they lived in the apartment. The record does not demonstrate that Dr. Bernstein conducted the same type of testing that Dr. Isenhower performed in *Westberry*. Dr. Bernstein, in addition, fails to provide any scientific or medical explanation for his opinions. In *Westberry*, there was ample evidence before the court that the plaintiff had been exposed to severe concentrations of talc, which the court found to be a sinus irritant. Here, Mr. Ginste testified that the Roches had been exposed to "severe" mold concentrations; however, not all mold spores are allergens and not all molds produce mycotoxins. Plaintiffs did not proffer any reliable tests of the levels of mold spores present in the apartment. The Court finds notable and considerable differences between this case and *Westberry*. The Court concludes that Dr. Bernstein fails to provide an adequate methodology for his conclusions on proximate causation, and his primary reliance on temporal relationships is scientifically invalid.

III. CONCLUSION

The Court concludes that Dr. Bernstein fails to "provide any evidence that a particular mold in the [apartment] had a greater possibility than cigarettes, dust mites, fibers, [cat dander], . . . , or any number of present environmental allergens, of causing health effects in [the Roches]. *Flores v. Allstate Texas Lloyd's Co.*, 229 F. Supp.

2d 697, 702 (S.D. Tex. 2002). The Court holds that Dr. Bernstein failed to adhere to the established methodology of differential diagnosis. His sole reliance on temporal relation is insufficient to satisfy the requirements of *Daubert* and its progeny. Dr. Bernstein's testimony is scientifically invalid. Accordingly, the Court excludes Dr. Bernstein's testimony as to proximate causation for the Roches' injuries as inadmissible.

An appropriate order with respect to the motion to bar the testimony of Dr. Bernstein will issue forthwith.

The Clerk is directed to forward a copy of this Memorandum Opinion to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

ORDER

THIS MATTER is before the Court on Defendants', Lincoln Property Company ("Lincoln") and the State of Wisconsin Investment Board ("SWIB"), motions to bar the testimony by Richard Bernstein, M.D. For the reasons stated in its Memorandum Opinion of July 25, 2003, the Court grants Defendants' motion to bar the testimony of Dr. Bernstein; therefore, it is hereby

ORDERED that Defendants, Lincoln Property Company's and the State of Wisconsin Investment Board's, Motions to Bar the Testimony of Richard Bernstein, M.D., are GRANTED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

JUDGMENT

THIS MATTER is before the Court on Plaintiffs', Christophe and Juanita Roche, and Defendants', Lincoln Property Company and the State of Wisconsin Investment Board, motions for summary judgment on all of Plaintiffs' claims. In its previous Order of July 25, 2003, the Court granted Defendants' motion for summary judgment as to all of Plaintiffs' claims and denied Plaintiffs' motion for summary judgment. From the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendants Lincoln Property Company and the State of Wisconsin Board and against Plaintiffs Christophe and Juanita Roche.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Rule 58 of the Federal Rules of Civil Procedure.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[Filed Aug. 11, 2003]

MEMORANDUM ORDER

THIS MATTER is before the Court on Plaintiffs Christophe and Juanita Roche's motions for post-judgment relief: (1) motion to remand pursuant to 28 U.S.C. § 1447(c) and (2) motion to set aside judgment as void under Rule 60(b)(4) of the Federal Rules of Civil Procedure. This case concerns Plaintiffs Christophe and Juanita Roche's claim that Defendants failed to properly maintain their apartment, that such failure allowed toxic levels of mold to develop in various areas of the apartment, and that these toxic mold levels caused Plaintiffs and their family, including their pets, various personal and monetary injuries. The issue before the Court in the motion to remand is whether Defendant Lincoln Property Company ("Lincoln") is a citizen of Virginia and henceforth not a diverse party. The Court holds that Lincoln is not a citizen of Virginia, but a citizen of Texas, because Lincoln is registered as a Texas corporation with its principal place of business in Texas. Furthermore, Lincoln's partnership, which

manages the Westfield Village Apartments in Virginia, is a citizen of Texas because all of its partners are citizens of Texas.

The issue before the Court on Plaintiffs' motion for relief pursuant to Rule 60(b)(4) is whether the State of Wisconsin Investment Board ("SWIB") is an arm of the State of Wisconsin and, henceforth, not subject to diversity jurisdiction in a federal court. The Court holds that SWIB is subject to diversity jurisdiction because SWIB is an independent agency, not an arm of the State of Wisconsin, with the power to sue and be sued. Furthermore, the Wisconsin Court of Appeals held, in *Bahr v. State of Wisconsin Investment Board*, 521 N.W.2d 152 (Wisc. Ct. App. 1994) *review denied* 525 N.W.2d 733, that SWIB was not entitled to sovereign immunity because it was an agency with independent proprietary powers and functions. For the reasons stated herein, the Court denies the motion to remand and the motion to set aside the judgment pursuant to Rule 60(b)(4).

I. BACKGROUND

On August 22, 2002, Plaintiffs filed Motions for Judgment against Lincoln Property Company, t/a Lincoln Property Company ECW, Inc., and SWIB in the Circuit Court for Fairfax County. On September 17, 2002, Defendants removed the case to this Court based on the diversity of citizenship of the parties, pursuant to 28 U.S.C. §§ 1441 and 1332. In March 2003, the parties filed motions for summary judgment. On April 16, 2003, the Court entered an Order granting Defendants' motion for summary judgment and informing the parties that the Court would render a thorough ruling in the near future. By Memorandum Order dated July 25, 2003, the Court rendered its decision in the case and entered judgment in favor of the Defendants as to all counts in the Second Amended Complaint; the Court also entered judgment in favor of Defendants on that same day. Subsequent to the initial ruling, but before the Memorandum Order and

Judgment, Plaintiffs filed a motion to remand the case to state court on the basis that the Court lacked subject matter jurisdiction because Lincoln was a citizen of Virginia. On May 2, 2003, Plaintiffs filed a motion for Rule 60(b)(4) relief on the basis that SWIB was not subject to diversity jurisdiction because SWIB was an arm of the State of Wisconsin.

II. DISCUSSION

A. Motion to Remand

In accordance with 28 U.S.C. § 1447, "[i]f at any time before final judgment if appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Plaintiffs assert that this Court is without subject matter jurisdiction because Defendant Lincoln is not a Texas corporation, is not a corporation at all, but rather a partnership with a partner who is a Virginia resident. (Pls.' Mem. Supp. Mot. to Remand at 2.) Plaintiffs contend that Defendant Lincoln misrepresented its state of citizenship in its Notice of Removal. (*Id.* at 3) Plaintiffs base their arguments on: (1) the deposition of Fred E. Chaney, Lincoln's Rule 30(b)(6) designee, who allegedly stated that Lincoln was a partnership and not a company; (2) the deposition of John LeBeau, Vice President of the Mid-Atlantic Regional Division of Lincoln, who identified Jeff Franzen as a Senior Vice President, partner, in Lincoln Property Company; (3) Lincoln's corporate website identifying Jeff Franzen as a "partner"; (4) certificates from the State Corporation Commission certifying that Lincoln Property Company is neither authorized nor registered to conduct business in Virginia and certifying that EQR/Lincoln Limited Partnership is an authorized and registered partnership in Virginia; (5) and the Fairfax County Tax Assessment Office records demonstrating that Jeff Franzen is a resident of Fairfax County, Virginia.

The Plaintiffs' reliance on these documents for their arguments is misplaced for several reasons. First, the en-

tity Plaintiffs identified in their Motion for Judgment filed in state court is Lincoln Property Company, located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas 72501. This corporation is a Texas corporation with its principal place of business in Texas. (Dan M. Jacks Decl., Ex. 1(A)-(E).) Therefore, the entity that Plaintiffs sued is a Texas corporation. Lincoln Property Company is not a citizen of Virginia since the company is not registered to conduct business in Virginia. Second, Mr. Chaney actually testified that Lincoln operates under many different structures and that he is a partner in new deals. (*See* Fred E. Chaney Dep. at 4:15-5:3.) Mr. Chaney did not testify that the Defendant Lincoln was a partnership of whom he is a partner. Third, Mr. Franzen was not a partner of either Defendant Lincoln or its subsidiary EQR/Lincoln Limited Partnership ("EQR"), the partnership responsible for collecting management fees for the Westfield Village apartments. Mr. LeBeau's testimony demonstrates that he knew Mr. Franzen's title, but he did not know of whom Mr. Franzen was a partner. (*See* LeBeau Dep. at 21:2-10.) The corporate website does not specify the partnership to whom Mr. Franzen belongs. Thus, this evidence fails to demonstrate that Mr. Franzen was a partner in either the Defendant Lincoln or its subsidiary EQR. Mr. Franzen is actually a partner in several limited partnerships that are involved in the acquisition and development of properties, not any partnership involved in this case. (Defs.' Mem. Opp. Mot. to Remand at 6-7.) Therefore, Mr. Franzen's citizenship is immaterial.

Fourth, even if EQR is the proper defendant in this case (although Plaintiffs did not sue this entity), EQR is not a citizen of Virginia. For the purposes of determining diversity jurisdiction, a limited partnership's citizenship is determined by reference to the citizenship of each of its partners. *Carden v. Arkoma Assoc.*, 494 U.S. 185, 192-93 (1990). EQR is a partnership registered and operating under the laws of Delaware. Furthermore, EQR's partners are: (1) Lincoln Eastern Management Corporation,

which is incorporated in Texas and maintains its principal place of business in Texas, and (2) Lincoln Placeholder Limited Partnership, which is a Texas partnership. (Jacks Decl., Ex. 1(C) and (D).) In addition, Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Texas. (Jacks Decl., Ex. 1(D and E).) Therefore, EQR is a citizen of Texas and no other state; and, even assuming that EQR is the proper defendant, EQR's citizenship is diverse from the Plaintiffs. Although Plaintiffs contend in their Rule 60(b) motion that SWIB is not a citizen of Wisconsin for diversity purposes, for the reasons stated, *infra*, the Court concludes that SWIB is a citizen of Wisconsin and amenable to diversity jurisdiction. For the foregoing reasons, the Court concludes that Lincoln, a Texas corporation, or EQR, a Texas partnership, are not citizens of Virginia and that the Defendants are diverse from the Plaintiffs. Removal was proper in this case, and the Court, having decided the matter on its merits, denies Plaintiffs' motion to remand.

B. Motion for Relief under Rule 60(b)

Rule 60(b) of the Federal Rules of Civil Procedure provides that a court may relieve a party, on motion and upon such terms as are just, from a final judgment if the judgment is void. Fed. R. Civ. P. 60(b)(4). Plaintiffs contend that the Court's judgment of July 25, 2003, is void because SWIB is an arm or the alter ego of the State of Wisconsin and, therefore, not amenable to suit in federal court based on diversity jurisdiction. As stated in *Moor v. County of Alameda*, 411 U.S. 693 (1973), a state is not a citizen for purposes of diversity jurisdiction. Moreover, a political subdivision of a state, unless it is an arm or the alter ego of the state, is a citizen of the state for diversity purposes. *Id.* at 717. Thus, the issue before the Court is whether SWIB is to be treated as an arm of the state or is instead to be treated as a municipal corporation or

other political subdivision amenable to jurisdiction based on diversity of citizenship. The Court holds that SWIB is not an arm of the State of Wisconsin; SWIB is an independent corporate body created under the laws of Wisconsin and subject to diversity jurisdiction.

Although not on all fours with the issue before the Court, the Court utilizes the analysis employed in Eleventh Amendment immunity cases to determine whether SWIB is an independent agency or an arm of the State of Wisconsin. In order to determine whether SWIB is an arm of the state, the Court must undertake an examination of SWIB's relationship to the State of Wisconsin. "The principal factor, upon which courts have virtually always relied, is whether a judgment against the governmental entity would have to be paid from the state's treasury." *Cash v. Granville Cnty Bd. of Educ.*, 242 F.3d 219, 223 (4th Cir. 2001). A finding that a judgment against the particular entity would not be paid from the state's treasury weighs against a finding that the entity is immune. *Id.* at 224. However, such a finding is not dispositive of the matter; and the Court must then consider three additional factors: "(1) the degree of control that the state exercises over the entity or the degree of autonomy from the state that the entity enjoys; (2) the scope of the entity's concerns – whether local or statewide – with which the entity is involved; and (3) the manner in which state law treats the entity." *Id.*

The first question is whether a judgment against SWIB would affect the Wisconsin state treasury. This inquiry requires a brief explanation of SWIB's structure. SWIB manages over forty separate investment funds. (Aff. Keith Johnson, Ex. 1.) Some of these funds consist of money from various state agencies, some are comprised of money from municipalities and other non-state level entities, still other funds consist of money from current and former state employees. (*Id.*) Although SWIB manages both state and private funds, each fund is managed sepa-

rately; and, per statute, the expenses associated with the management of each fund, including any liabilities, are assessed against the fund for which the services were furnished or the liabilities incurred. *See Bahr*, 521 N.W.2d at 158 ("In each instance, the expenses incurred in the exercise of these powers are to be paid by the board out of the current income of the particular fund for which the action was taken; no state-appropriated funds are involved.") Relating specifically to this action, the Wisconsin Retirement System – Fixed Investment Trust (the "Trust") was the fund that owned the Westfield Village apartments; thus, any liabilities arising from this case would be paid out of this fund. (Johnson Aff., Ex. 1 at ¶ 9.) The funds contained within the Trust are retirement funds for current and former state employees. (*Id.* at ¶ 7.) As stated by Wisconsin's Attorney General, "Monies paid into Employee Trust Funds are not State Funds." 1 Op. Att'y Gen. Wisc. 95, 2 (February 14, 1995). Therefore, a judgment against SWIB in this case would not affect the State of Wisconsin's treasury, but only the employee retirement fund. Having found that the first question is not dispositive, the Court now considers the three remaining factors addressed in *Cash*.

Considering the degree of control the State of Wisconsin exercises over SWIB, the Court finds that SWIB is an independent and autonomous entity. First, the Wisconsin legislature has expressly declared its intent that SWIB be "an independent agency of the state which is to manage money and property for the state, its agencies and trust funds," with the goal of "accomplishing the purpose of each trust or fund." Wis. Stat. § 25.15(1) (2001). Second, the legislature declared that SWIB was "a body corporate with the power to sue and be sued in said name." Wis. Stat. § 25.17 (2001). Although the fact that the legislature declared that SWIB has the power to sue and be sued

is not dispositive[15], its declaration that SWIB is a body corporate evinces an intent that SWIB is a corporation – separate and distinct from the state – and a citizen of Wisconsin for diversity jurisdiction purposes. Third, in its opinion in *Bahr*, the Wisconsin Court of Appeals found that the various statutes governing SWIB's operations provide SWIB with considerable autonomy from the state in its investment decisions.[16] 521 N.W.2d at 157-58. That court ultimately concluded that SWIB could not raise the defense of sovereign immunity in a state court action seeking declaratory relief. *Id.* at 159. Therefore, the Court finds that SWIB exercises considerable autonomy from the state.

As to the scope of SWIB's concerns (local versus state-wide), the Court finds that this factor favors a finding that SWIB is not an arm of the state. SWIB manages investments on behalf of state agencies, local entities, and state and local employees. Thus, SWIB's concerns are directly reflected by the particular fund in question – the employee retirement trust funds in this instance. This fund is not concerned with either local or state-wide inter-

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[15] *See Martin v. Univ. of Louisville*, 541 F.2d 1171 (6th Cir. 1976) (holding that Kentucky statute giving University of Louisville power to sue and be sued in its corporate name did not constitute a waiver of that state's Eleventh Amendment immunity); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976) (same).

[16] Section 25.17(1) provides grants SWIB the "exclusive control of the investment and collection of the principal and interest of all moneys loaned or invested from" the forty-one funds. Section 25.18(1)(a) authorizes SWIB to employ special counsel "in any matters arising out of the scope of its investment authority," with the expenses assessed to the current income of the fund for which the services were provided. Section 25.18 also authorizes SWIB to execute instruments, indemnify against its failures and losses, to secure insurance against any risks relating to its functions, to liquidate any corporation in which it owns 100% of the stock, to sell and purchase stock, and to employ contractors or other agents "necessary to evaluate or operate any property" in which it or a fund it manages has an interest. *Bahr*, 521 N.W.2d at 157-58.

ests, but the interests of current and future retirees at the local and state level. Thus, SWIB, in this instance, has concerns that pertain solely to private individuals.

Finally, the last factor weighs in favor of a finding that SWIB is not an arm or the alter ego of the state. As a matter of Wisconsin law, SWIB is an "independent agency of the state." Wisc. Stat. § 25.15(1). As previously discussed, the only Wisconsin court to have addressed SWIB's status as an arm or alter ego of the state found that SWIB was "the type of independent going concern long held to be ineligible to raise the defense of sovereign immunity." *Bahr*, 521 N.W.2d at 159. Therefore, it is undeniably clear that SWIB is not an arm of the State of Wisconsin. Moreover, SWIB is a body corporate with the power to sue and be sued. The Court concludes that, in light of the Wisconsin Court of Appeals' decision in *Bahr* and the various Wisconsin statutes cited herein, SWIB is an independent citizen of Wisconsin, diverse in citizenship from the Plaintiffs, and subject to this Court's subject matter jurisdiction.

III. CONCLUSION

In the interests of justice, the Court has addressed both of Plaintiffs' post-judgment motions; however, the Court is obliged to note several procedural deficiencies in Plaintiffs' motion practice. Plaintiffs filed their Motion to Remand pursuant to 28 U.S.C. § 1447(c) on April 22, 2003; Plaintiffs also filed a memorandum addressing Lincoln's alleged lack of diversity of citizenship with the Plaintiffs. Defendants responded on April 30, 2003. However, on that same day, Plaintiffs filed an "Addendum" to their motion. Plaintiffs addressed, in the Addendum, how SWIB was an arm of the State of Wisconsin and not a citizen of Wisconsin for diversity purposes. Plaintiffs, however, fail to provide any rule of law supporting the timing of their last-minute filing.

The Court concludes that Lincoln, a Texas corporation, or EQR, a Texas partnership, are not citizens of Virginia

and that removal of this case was proper. Furthermore, SWIB is an independent citizen of Wisconsin, diverse in citizenship from the Plaintiffs, and subject to this Court's subject matter jurisdiction. The Court holds that Lincoln was a citizen of Texas and SWIB a citizen of Wisconsin; furthermore, the Defendants have diverse citizenship from the Plaintiffs who are citizens of Virginia. Thus, it is hereby

ORDERED that Plaintiffs Christophe and Juanita Roche's Motion to Remand Pursuant to 28 U.S.C. § 1447(c) is DENIED. It is further

ORDERED that Plaintiffs Christophe and Juanita Roche's Motion for Rule 60(b) Relief from an Order of Judgment That is Void is DENIED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 11th day of August, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
08/11/03

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[Filed Sept. 3, 2003]

ORDER

THIS MATTER is before the Court on (1) Plaintiffs' motion for reconsideration of the Court's Order entering summary judgment in favor of the Defendants Lincoln Property Company and SWIB Investment Company and (2) Plaintiffs' motion for reconsideration of the Court's Order of August 11, 2003. The Court has reviewed the parties' submissions regarding these motions and their previous submissions regarding the motions for summary judgment and other post-judgment motions. The Court finds that Plaintiffs do not advance any new authority to support their renewed arguments. Plaintiffs merely cast the undisputed facts in a different light.

Furthermore, Plaintiffs ask the Court to review the previous filings connected with its motion to remand and to reconsider the reasons set forth therein as a basis for reconsideration. The Court fails to find a rule of law which allows a party to file a motion to reconsider based on arguments set forth in the previously decided motion

without providing more than a regurgitation of the law and the facts. Plaintiffs fail to provide any basis for relief pursuant to Federal Rule of Civil Procedure 59(e).

The Court concludes that Plaintiffs' arguments do not create a genuine issue of material fact "sufficient to survive a motion for summary judgment." *Cox v. County of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001). The Court has dealt with these arguments and issues in its Memorandum Order of July 25, 2003, and in its Memorandum Order of August 11, 2003. Therefore, it is hereby

ORDERED that Plaintiffs' Motion for Reconsideration of Order Entering Summary Judgment in Favor of Defendants Lincoln Property Company and SWIB Investment Company is DENIED. It is further

ORDERED that Plaintiffs' Motion to Reconsider the Court's Memorandum Order of August 11, 2003, is DENIED.

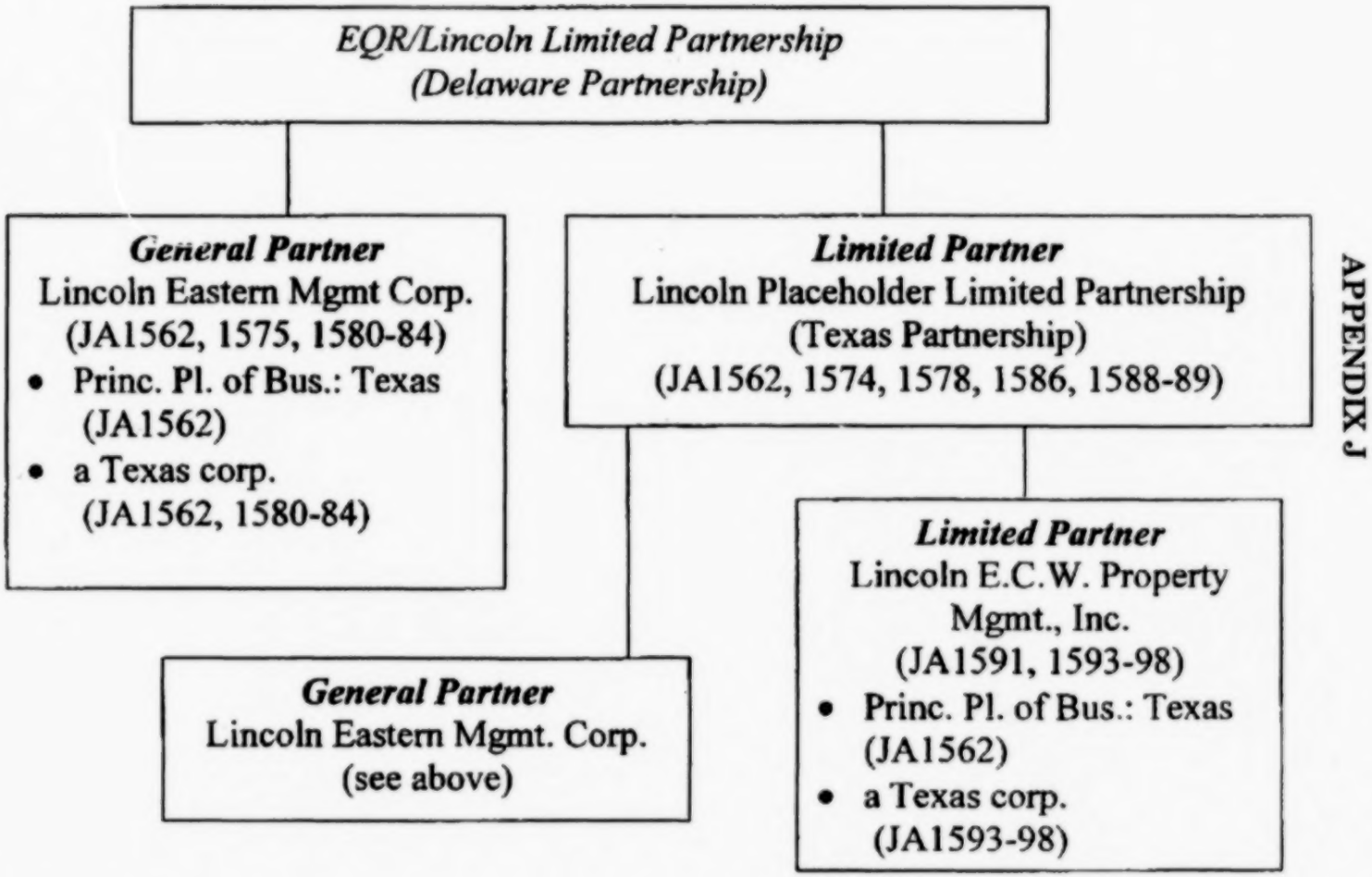
The Clerk is directed to forward a copy of this Order to counsel.

Entered this 3rd day of September, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
09/03/03



Thus, the Opinion clearly erred in holding that no record evidence established the identity and non-Virginia citizenship of EQR's limited partners. LPLP was plainly identified as the limited partner in EQR, and it was further plainly identified as a Texas partnership.[8] Petitioners more than met their burden of demonstrating that EQR was a Texas partnership diverse to the Roches.

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[8] The Court's criticism that the district court "did not determine the citizenship of the real parties in interest," referring to EQR (Op. at 10), also is not correct. The district court expressly found that, even if EQR were the "real party in interest," diversity jurisdiction would still exist because EQR was a Texas partnership for the purposes of diversity jurisdiction. See JA1975-76.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2064
CA-02-1390-A

CHRISTOPHER ROCHE; JUANITA ROCHE,
Plaintiffs-Appellants,

v.

LINCOLN PROPERTY COMPANY;
SWIB INVESTMENT COMPANY,
Defendants-Appellees.

AND

INVESCO INSTITUTIONAL,
Defendant.

[Filed July 27, 2004]

On Petition for Rehearing and Rehearing En Banc

The appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Widener, Judge Gregory, and Judge Beam.

For the Court,

/s/ PATRICIA S. CONNOR
Clerk

APPENDIX L

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

October 18, 2004

Mr. David C. Frederick
Kellogg Huber Hansen Todd & Evans
1615 M Street, NW
Suite 400
Washington, DC 20036

Re: Lincoln Property Company, et al.
v. Christopher Roche, et al.
Application No. 04A298

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on October 18, 2004 extended the time to and including November 24, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ GAIL JOHNSON
Gail Johnson
Case Analyst

[attached notification list omitted]

APPENDIX M

STATUTES INVOLVED

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except

that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the

United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not

be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 17 provides:

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on be half of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

(2)

No. 04-712

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY, *et al.*,
Petitioners,

v.

CHRISTOPHER ROCHE, *et ux.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE FOR THE REAL ESTATE ROUNDTABLE, NATIONAL MULTI HOUSING COUNCIL, AMERICAN HOTEL & LODGING ASSOCIATION, AMERICAN RESORT DEVELOPMENT ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION, INSTITUTE OF REAL ESTATE MANAGEMENT, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF HOMEBUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, AND NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

This case presents basic jurisdictional issues of exceptional importance to businesses—such as those in the commercial and residential real estate industry—that operate in multiple states through affiliated entities, including limited partnerships.[1] The overriding question concerns the manner in which federal courts should assess a business defendant's citizenship for purposes of establishing diversity jurisdiction. 28 U.S.C. § 1332(a). That question, in turn, governs the ability of business defendants to invoke their right under 28 U.S.C. § 1441(b) to remove an action to a federal forum. That removal right has long played a vital role in ensuring that, where federal jurisdiction exists, non-resident defendants may access federal courts and, more to the point, "a tribunal free from local prejudice." Pet. App. 15a-16a.

Section 1441(b) provides that a case is removable if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." This case was filed in Virginia state court. The only parties "properly joined and served as defendants" are petitioners Lincoln Property Company (Lincoln), a Texas corporation with its principal place of business in Texas, and State of Wisconsin Investment Board, a Wisconsin entity. It is undisputed that neither defendant is a citizen of Virginia, as are respondents, and that the named parties are therefore diverse pursuant to 28 U.S.C. § 1332(a). Petitioners removed the case from state court to federal court pursuant to Section 1441(b), and the district court entered summary judgment in their favor. Pet. App. 39a, 88a. The Fourth Circuit, however, reversed and remanded with instructions that the case

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[1] Pursuant to this Court's Rule 37.6, amici notes that no part of this brief was authored by counsel for any party, and no person or entity other than amici made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a).

be returned to state court on the ground that defendants had "failed to carry their burden of proof with respect to their allegedly diverse citizenship." *Id.* at 2a.

In at least two critical respects, the Fourth Circuit's decision disrupts the settled framework for determining the citizenship of business defendants. First, the decision instructs courts to look beyond the citizenship of the defendant named in the complaint and to identify non-named affiliates that may destroy diversity under a "real parties in interest" analysis. Pet. App. 14a. Second, the decision instructs courts that the citizenship of a non-named limited partnership may be based on its "nexus" to the state in which the lawsuit is filed, as opposed to the citizenship of its partners. *Id.* at 16a. The decision thus transforms a basic jurisdictional determination into a free-wheeling, fact-intensive inquiry that considers the existence of non-named entities such as limited partnerships and limited liability companies that might have a connection to a named defendant or the events at issue, and then gauges the "nexus" among any such affiliated entities, the parties named in the complaint, and the forum state. For businesses that operate in multiple states through various affiliates, the Fourth Circuit's decision is a recipe for uncertainty and wasteful litigation over a threshold jurisdictional determination made in thousands of cases each year—in the Fourth Circuit alone.

Amici have a direct and substantial interest in the proper resolution of the important jurisdictional issues presented by this case. Amici are The Real Estate Roundtable, National Multi Housing Council, American Hotel & Lodging Association, American Resort Development Association, Building Owners and Managers Association, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Association of Homebuilders, National Association of Industrial and Office Properties, National Association of Real Estate Investment Trusts, and National Association of Realtors. Lincoln is a

member of the National Multi Housing Council and the International Council of Shopping Centers. A description of the mission, organization, and activities of each of the amici associations is set forth in the addendum to this brief.

Amici represent a broad spectrum of commercial and residential real estate interests present in virtually every county in America. Amici's members include owners and lessors of commercial property such as office buildings, shopping centers, apartments, industrial and distribution facilities, hotels, and resorts. They also include developers, property managers, brokers, realtors, homebuilders, Real Estate Investment Trusts, financial institutions, investment advisors, and individual and institutional investors. Amici's members routinely operate through separate legal entities including corporate subsidiaries, trusts, limited partnerships, and limited liability companies in conducting operations with respect to different properties in multiple states. The multi-faceted structure of such enterprises is based on legitimate considerations discussed below, and reflects the practical challenges of doing business in the real estate industry.

The Fourth Circuit's decision creates the potential for enormous uncertainty for amici's members with respect to a crucial jurisdictional determination. Even when, as here, a plaintiff has named a business entity as defendant that is undeniably diverse, the Fourth Circuit's decision may require a court to question the existence of diversity jurisdiction and require the defendant to *disprove* a connection between non-named affiliates and the events at issue or the forum state. In addition, the Fourth Circuit's decision creates uncertainty as to the citizenship of limited partnerships and other entities—through which amici's members operate—for purposes of establishing diversity by holding that citizenship may be based on a partnership's purported "nexus" (Pet. App. 16a) to a state rather than the citizenship of its partners. The Fourth Circuit's analysis will increase the costs of removing such suits to federal court by generating collateral litigation over a

threshold jurisdictional determination. Moreover, the Fourth Circuit's decision will create business and investment uncertainty to the extent that it deprives businesses of their statutory right to remove a case to federal court.

The Fourth Circuit's decision has national implications for amici's members. As explained below, the Fourth Circuit's decision conflicts with the decisions of other federal circuits on the jurisdictional issues presented. Because many if not most of amici's members operate in multiple states, the circuit conflicts created and deepened by the Fourth Circuit's decision may subject amici's members to different treatment in different states as to a basic jurisdictional determination. Few jurisdictional issues are more important than the rules that govern the diversity determination, because more than 60,000 diversity cases are litigated each year. *See* Pet. 2. Amici urge this Court to grant the petition and establish uniformity on the important jurisdictional issues presented.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision holds that, in determining citizenship for purposes of diversity jurisdiction, a court should look beyond the citizenship of a corporate defendant named in the complaint and impose on the defendant a burden to prove that the citizenship of affiliates *not* named in the complaint does not destroy diversity under a factbound and indeterminate "real party in interest" analysis. Applying that analysis, the Fourth Circuit reversed a judgment in favor of petitioners on the merits and ordered that the case be sent back to state court on the ground that one of Lincoln's affiliates—a limited partnership that was not named by plaintiffs as a defendant in the original complaint, added as a defendant in an amended complaint, or joined as a necessary and indispensable party—was the "real party in interest," and that the affiliate would destroy diversity based on its purported "nexus" to Virginia. Pet. App. 16a. As explained in the petition, that decision is fundamentally flawed.

The "real party in interest" concept was designed to inquire into the citizenship or legitimacy of the parties *bringing* the suit and generally has focused on the "nominal or formal parties" named in a complaint. *Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 460-461 (1980). The Fourth Circuit's decision dramatically expands that concept by employing it to look *beyond* the "nominal or formal" parties named in the complaint and then obligating a defendant to establish that other entities are not a "real party in interest," even though the plaintiff has not named such entities or sought to join them under Fed. R. Civ. P. 19. The Fourth Circuit's free-ranging "real party in interest" inquiry also conflicts with the terms of the removal statute, which explicitly places the focus on the citizenship of the "parties in interest *properly joined and served* as defendants." 28 U.S.C. § 1441(b) (emphasis added). In short, with no justification, the Fourth Circuit has turned the "real party in interest" concept into a formula for uncertainty and a diversity-destroying engine.

The Fourth Circuit's other holding is equally problematic from the standpoint of the plethora of multi-faceted business enterprises prevalent in today's economy. As this Court recently reaffirmed, the "accepted rule" is that a limited partnership "is a citizen of each state * * * of which any of its partners is a citizen." *Grupo Dataflux* v. *Atlas Global Group LP*, 124 S. Ct. 1920, 1923 (2002). The Fourth Circuit, however, has engrafted onto that straightforward rule a fact-intensive "nexus" element that may destroy diversity if the plaintiff can show that a partnership has a sufficient relationship to a particular state, even if none of its partners are citizens of that state. That kind of inquiry may be appropriate in determining whether a court has *personal* jurisdiction with respect to a limited partnership, but it has no place in the calculation whether *diversity* jurisdiction exists. The Fourth Circuit's decision throws into potential disarray the citizenship of hundreds if not thousands of partnerships that operate or own property in the Fourth Circuit.

The Fourth Circuit's erroneous decision plainly warrants this Court's review. First, the decision will have a disproportionate and recurring impact on an important sector of the American business community—enterprises, like most real estate businesses, that operate in multiple states through affiliated entities. Second, the decision will generate uncertainty—and the litigation risk that comes with uncertainty—over a fundamental jurisdictional question that is likely to arise frequently when an out-of-state entity is sued by an in-state resident in state court. Third, the decision may deprive business defendants of their statutory right to remove a case from state court to federal court, where diversity jurisdiction exists under a correct analysis. Finally, the decision conflicts with the decisions of other circuits on the jurisdictional issues presented, subjecting businesses that operate in multiple states through affiliated entities to different treatment with respect to a fundamental jurisdictional determination.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION WILL SIGNIFICANTLY IMPACT NUMEROUS BUSINESSES NATIONWIDE, ESPECIALLY THOSE IN THE REAL ESTATE INDUSTRY

The Fourth Circuit's misguided jurisdictional analysis will have a disproportionate impact on an important and widespread sector of the American economy—businesses that operate in multiple states through affiliated entities. As explained below, for legitimate business reasons, many if not most real estate enterprises operate in such a fashion.

1. There are thousands of businesses in the real estate industry across the county. Many of those businesses are affiliated with separate entities that, in turn, provide real estate-related services or own property in multiple states. It is not uncommon for such enterprises to have complex structures, such as Lincoln's. *See* Pet. App. 96a (chart of entities). The Fourth Circuit observed that it found "the

manner in which Lincoln conducts business (using many different structures)" to be "confusi[ng]." *Id.* at 16a n.16; *see id.* at 13a n.11. Moreover, the court appeared to fault Lincoln for its decision to do business through different entities. *See id.* at 14a ("[T]he citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises"). There is, however, nothing unusual or improper about Lincoln's business structure.

Indeed, real estate companies routinely do business in multiple states through separate entities created for particular properties, projects, or services. These subsidiaries, limited partnerships, and limited liability companies are specifically created to be separate from a parent entity. It is critical that courts respect the separate legal existence of each entity. That is just as true when it comes to determining citizenship for purposes of diversity jurisdiction as it is in making other legal determinations as to such entities. *Cf. United States* v. *Best Foods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.").

2. It is standard practice in the real estate industry to create a separate legal entity to own, lease, finance, manage, or develop a single property, or to undertake a specific service with respect to multiple properties. This entity is often referred to as a Special Purpose Entity, or SPE, and its "special purpose" is to own, lease, finance, manage, or develop the single asset it holds—the property. In addition, SPEs also are employed in the real estate industry to undertake only a specific service, such as property management, with respect to a number of properties owned by other SPEs.

With respect to a site-specific SPE, the property may be housing, an apartment complex, an office park, a shopping mall, or a resort. Fundamentally, the SPE is an entity that

has no debts or obligations other than those related to the property. A site-specific SPE generally conducts no business other than that relating to the specific property—it does not guarantee or assume the debts of other person or entity, it does not co-mingle funds with those of any other person or entity, and it holds itself out as being a separate legal entity from any other person or entity. *See generally* Steven G. Horowitz, *et al.*, *Use of Single Member Limited Liability Companies in Real Estate Finance Transactions*, Practicing Law Institute, 501 PLI/Real 157 (2004).

By way of example, consider a hypothetical parent corporation that is a property development and management company looking to invest in 50 properties, one in each state across the country, and assume that these properties include urban office buildings, suburban office parks, urban apartment buildings, suburban retail shopping centers, and industrial facilities. The parent entity is likely to set up one separate business entity—be it a limited partnership or a limited liability company—for each of these individual properties. Although the parent will be affiliated with each of the entities, none of the properties will be held directly by the parent. There are at least four primary reasons for utilizing a separate legal entity: financing, flexibility in structure, limitation of liability, and taxation.

Financing. Nearly all commercial real estate transactions, like nearly all residential real estate transactions, involve borrowing money from an institutional lender. Today's lenders typically require that the business entity that is developing or managing the property be an SPE with no assets or operations other than the real estate project securing the loan. By requiring that the property be held by an SPE, the institutional lender is better able to assess the risks entailed in making the loan and better able to insure that the

loan's performance will be impacted solely by the quality and operation of the mortgaged property.[2]

An institutional lender providing financing for a suburban retail shopping center can underwrite the loan by analyzing the risks of financing only that shopping center—including the likely business viability, revenue, operating costs, and value based on the geographic location and the particular sector of the real estate market involved. But the lender can analyze and predict with far less certainty the risk of the loan if the lender must attempt to evaluate the potential performance of 49 other properties spread across multiple urban and suburban landscapes and sectors of the real estate market.

Institutional lenders seek individual properties held in isolation from other properties to protect themselves from the potential bankruptcy of any business organization affiliated with the borrower. They do not want the poor performance of any other property owned by the borrower, its sponsors, or its affiliates to have an impact on repayment of their loan. In other words, institutional lenders require that the property they are financing be isolated from any other debts or obligations related to any other asset. A lender that is financing development of an apartment complex in suburban Atlanta,

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[2] Commercial mortgages are increasingly bundled together and sold as commercial mortgage-backed securities in a national market to private investors nationwide. The credit rating for such securitized loans is based primarily, if not solely, on the property involved, not the creditworthiness of the borrowers. SPEs are used to reduce the risks inherent in commercial real estate. *See generally* Kathleen O. McKune, *Special Purpose Entities—Who, What, Why, Where, When, and How?*, Practical Real Estate Lawyer, 20 No. 6 Prac. Real Estate Law 7 (2004); *Legal Critera for U.S. Structured Finance Transactions*, Standard & Poor's, ch.3 (2004). For example, some rating agencies will make commercial mortgaged-backed loans only if the property owner agrees to limit its obligations to the single property. *See* Alvin L. Arnold *et al.*, *Construction & Development Financing* § 5:45.50 (3d ed. 2004).

or a tract of single-family homes in Denver, for example, requires that its financing not be used toward the management of an office building in Manhattan. By requiring use of an SPE, banks can insulate their loan from dependence on the success or failure of other properties.[3]

Flexibility. Utilizing SPEs with respect to different properties provides real estate businesses with needed flexibility as well. A real estate company is often not the only entity involved in a real estate venture, but rather partners with different investors on a property-by-property basis. These investors have an interest in a specific property—the one in which they invested. Holding the property in an SPE is the most appropriate way to provide these investors with an ownership interest that reflects their investment. For example, an investor who contributes 25 percent of the equity requirement of an office park in suburban Chicago wants a legal structure that holds the office park in a manner that reflects his interest. If the property is held by a parent entity, along with other properties in which the investor has no interest, the structure will not reflect the investor's actual contribution and may increase the risk of his investment.

Limitation of Liability. Real estate entities also use SPEs to limit liability to that business entity's assets. The investor described above who is willing to invest in a suburban office park or apartment complex in one state wants to avoid any potential liability for a tenant dispute or property damage claim in a retail shopping center in another state with which

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[3] The concept of structurally isolating the legal ownership of an asset through an SPE is known as being "bankruptcy-remote" and protects lenders against "substantive consolidation," a judge-made doctrine that allows the bankruptcy court to treat multiple entities as a single debtor. *See generally* Richard D. Jones, *et al.*, *Practical Advice on the Preparation of the Substantive Non-Consolidation Opinion in Real Estate Transactions*, American Law Institute, SHO96 ALI-ABA 469 (2003).

the investor has no involvement and contributed no investment. By creating SPEs that hold single assets, the parent and its transaction partners or affiliates may avoid the risk of preexisting liabilities and insulate each property from liability problems involving other property. Real estate investors are particularly concerned about potential uninsured property liabilities such as tenant failures or environmental hazards.

Taxation. Nearly all states impose taxes for carrying on or doing business in that state. If all 50 of the properties in the hypothetical example above were held together by one corporation or one unincorporated entity, each state would make its own calculation of the proper allotment of net income from all 50 properties to that state—rather than taxing precisely the business that was done in that state. *See, e.g.*, *Ford Motor Co.* v. *Beaucham*, 308 U.S. 331, 335 (1939) (state tax for privilege of doing business in state can be based on net income and is not limited to income from business within that state); *Reuters Ltd.* v. *Tax Appeals Tribunal*, 623 N.E.2d 1145, 1147 (N.Y. 1993) (international corporation doing business in 80 countries required to pay New York corporate franchise tax based on apportionment of worldwide net income), *cert. denied*, 512 U.S. 1235 (1994). By using separate business entities to conduct and carry on business in separate states, real estate companies may simplify their tax assessment administration and, at the same time, more fairly and accurately allocate their tax liability.

The successful functioning of the real estate industry—one of the largest sectors of the United States economy—is dependent in large measure on giving effect to these separate business structures, which may take the form of limited liability companies, trusts, or limited partnerships. Moreover, the proper functioning of that market is key to the stability of growing financial markets for commercial mortgage-backed securities and Real Estate Investment Trusts.

II. THE FOURTH CIRCUIT'S DECISION WILL FOSTER UNCERTAINTY FOR NUMEROUS BUSINESSES WITH RESPECT TO A CRUCIAL JURISDICTIONAL DETERMINATION

The Fourth Circuit's decision will generate uncertainty for the hundreds, if not thousands, of real estate firms that operate in multiple states through affiliated entities concerning the fundamental jurisdictional question whether diversity jurisdiction exists and the related—and equally important—question whether a case is removable to federal court.

1. As this Court recently emphasized, "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux*, 124 S. Ct. at 1930; *see also Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (jurisdictional rules should not depend on fact-specific inquires that are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal"); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion) (jurisdictional rules have long been designed "to avoid * * * uncertainty and litigation over the preliminary issue of the forum's competence"); *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring). The Fourth Circuit's decision creates uncertainty over a basic jurisdictional determination that is undertaken by federal courts thousands of times each year. Uncertainty leads to business risks which create new costs. Lenders, investors, and other market participants in the real estate industry accordingly abhor unnecessary risks.

2. The stark contrast between the district court's diversity analysis and the Fourth Circuit's analysis underscores the uncertainty that is likely to be fostered by the decision below. The district court's jurisdictional inquiry was clear and straightforward. The court looked to the complaint and determined the citizenship of the defendants that respon-

dents—Virginia citizens—had chosen to sue. *See* Pet. App. 84a-85a, 87a-88a, 92a-93a. They sued Lincoln, which is indisputably a Texas citizen, because it is a Texas corporation with its principal place of business in Texas. *See Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. 497, 558 (1844); 28 U.S.C. § 1332(c)(1) (citizenship of corporation is the place of incorporation and its principal place of business). Respondents also sued State of Wisconsin Investment Board, a Wisconsin entity. Based on the citizenship of the parties named in the complaint, diversity undeniably exists.[4]

By contrast, the Fourth Circuit held that "the citizenship of the nominal parties listed on the Complaint is in *no way* dispositive of subject matter jurisdiction." Pet. App. 17a (emphasis added). Thus, although the Fourth Circuit did not question that diversity exists with respect to the parties named in the complaint, the court held that it was necessary to look beyond the defendants named in the complaint and to ascertain the citizenship of any purported "real parties in interest." *Id.* at 14a. In applying that analysis, the court attempted to canvass Lincoln's business affiliates and ascertain how they were related to the action. *Id.* at 11a-14a. The court openly acknowledged that it had difficulty in understanding Lincoln's business structure and described it as "confusing." *Id.* at 14a; *see id.* at 13a n.11. The court ultimately faulted Lincoln for "the confusing structure of the

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[4] In addressing respondents' post-judgment motion for remand, the district court also considered the citizenship of one of Lincoln's affiliates, EQR/Lincoln Limited Partnership (EQR). The district court found that EQR is a citizen of Texas, because its partners are citizens of Texas. *See* Pet. App. 87a-88a, 92a-93a; *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 192-193 (1990), discussed *infra*. The district court did not hold that it was *necessary* to consider the citizenship of EQR in determining whether diversity exists. But in disposing of respondents' motion, it simply explained that jurisdiction would exist "even assuming" that EQR had been named as a defendant. Pet. App. 88a.

Lincoln group of enterprises," *id.* at 14a, and for failing to disprove that an affiliate was not a real party in interest.

The Fourth Circuit focused on EQR/Lincoln Limited Partnership (EQR), a Lincoln affiliate that was not named as a defendant. As the district court explained, EQR is formed in Delaware and is a Texas citizen for purposes of determining diversity jurisdiction because its partners are Texas citizens. Pet. App. 87a-88a; *see* note 4, *supra*. The Fourth Circuit acknowledged that EQR's listed partners are Texas citizens and that the record does not establish that any EQR partner is a citizen of Virginia. *See* Pet. App. 12a-13a. Nonetheless, the Fourth Circuit held that EQR was a "real and substantial party in interest" based on EQR's activities in managing the apartment complex where respondents lived; that EQR effectively must be regarded as a citizen of Virginia because "it owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth"; that EQR would destroy "complete diversity" if the action had been "maintained" against it or EQR had been "joined"; and that the case therefore "should be remanded" to state court. *Id.* at 16a-17a.

3. The Fourth Circuit's jurisdictional analysis is the antithesis of a clear and predictable rule. Under the Fourth Circuit's analysis, a business defendant with multiple affiliates cannot be assured that the citizenship determination will be based on its own legal citizenship. Instead, the defendant may be asked to prove that one of its affiliates is *not* a real party in interest to the case, even though the affiliate was not named as a defendant. The "real party in interest" inquiry is inherently fact-bound and indeterminate. For example, in this case, the Fourth Circuit demanded "evidence" concerning whether, or to what extent, non-named affiliates "are distinct or uninvolved" in the "business enterprises" of the named defendant and "property holdings." Pet. App. 11a. The Fourth Circuit's analysis also makes federal judges—including appellate judges—responsible for unraveling

complex business structures. The upshot is that a business defendant may not predict with any certainty whether it will be able to establish diversity, and thus will not be able to predict whether a case is removable from state court to federal court. In addition, federal courts will be required to make potentially complex factual determinations just to determine whether a case is removable in the first place.

The Fourth Circuit's analysis of the citizenship of EQR—the non-named affiliate that the court deemed to be "the real party in interest"—will generate uncertainty as to the citizenship of limited partnerships for diversity purposes. The "accepted rule" is that a limited partnership (or partnership) "is a citizen of each state or foreign country of which any of its partners is a citizen." *Grupo Dataflux*, 124 S. Ct. at 1923 (citing *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 192-195 (1990)). The Fourth Circuit, however, did not base its determination that EQR destroyed diversity on the citizenship of EQR's partners (which are Texas citizens, *see* note 4, *supra*), but rather on its finding that EQR has "a very close nexus with the Commonwealth, which is much stronger than any nexus to Texas made apparent by the record." Pet. App. 16a. That ruling creates great uncertainty for limited partnerships (and similar business entities) that have a presence in the Fourth Circuit. Such limited partnerships, many of which are engaged in the real estate business, no longer can assume that they can establish diversity based on the citizenship of their partners and, instead, are left to guess as to whether a court will find that their purported "nexus" with a particular state destroys (or creates) diversity.

The uncertainty created by the Fourth Circuit analysis will generate "wasteful" (*Grupo Dataflux*, 124 S. Ct. at 1920) litigation. In this case, for example, respondents sued Lincoln because its trade name was used in connection with the management of the property underlying the suit. Pet. 11. Lincoln answered the complaint fully prepared to satisfy any award against it, removed the case to federal court based on

the diversity of the parties named in the complaint, and litigated the case to a judgment in its favor. Yet, on appeal, the federal courts determined—for the first time—that a non-named affiliate of Lincoln was the "real party in interest," and that affiliate was a citizen of Virginia based on its "nexus" to the state. Even though the plaintiffs had not named the affiliate as a defendant, or even attempted to join the affiliate as a party, the Fourth Circuit reversed the judgment in respondents favor and ordered that the case be remanded to state court for the litigation to begin over again.

III. THE FOURTH CIRCUIT'S DECISION WILL IMPROPERLY DEPRIVE BUSINESSES OF THEIR STATUTORY RIGHT TO REMOVE A SUIT TO AN IMPARTIAL FEDERAL FORUM

The Fourth Circuit's decision creates a diversity-destroying rule that will improperly deprive business defendants of their statutory right to remove a case to federal court where diversity jurisdiction properly exists if they cannot establish diversity under the Fourth Circuit's open-ended analysis.

Diversity jurisdiction has been a fundamental component of federal court jurisdiction since the founding, *see* U.S. Const. art. III, § 2; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, and serves a vital policy objective. As this Court has explained, "the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views." *Great So. Fire Proof Hotel Co.* v. *Jones*, 193 U.S. 532, 544 (1904); *see also* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1556, at 422 (1990) ("basic purpose of diversity jurisdiction is thought to be the protection of out-of-state parties from the possible prejudice of local courts").

Moreover, when a plaintiff files an action in state court over which the federal courts would have diversity jurisdiction, defendants have a statutory right to remove the action to federal court, as long as "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b); *see Catapillar, Inc.* v. *Lewis*, 519 U.S. 61, 68 (1996). As this Court recognized long ago, "[t]he right of choosing an impartial tribunal is a privilege of no small practical importance." *Marshall* v. *Baltimore & Ohio R.R.*, 57 U.S. 314, 329 (1853). Indeed, thousands of out-of-state defendants choose to exercise that right each year and remove state actions to federal courts in order to obtain a potentially more impartial forum. In 2003, more than 44,000 cases were removed from state court to federal court (considering all bases of jurisdiction). *Judicial Business of the United States Courts 2003*, Table S-7 (*available at* www.uscourts.gov/judbus2003/tables/s7.pdf). Out-of-state businesses, in particular, are often concerned that they may experience local prejudices by being forced to litigate in a foreign state court.

The Fourth Circuit's decision may improperly deprive out-of-state businesses of their statutory right to remove cases to federal court where diversity jurisdiction exists. Indeed, in this case, Lincoln removed the action to federal court based on the diversity of citizenship among the parties named in the complaint and obtained a judgment in its favor in the district court. But the Fourth Circuit reversed that judgment and ordered that the case be sent back to state court based on the application of its misguided "real party in interest" analysis and its conclusion that Lincoln had failed to prove that EQR—a non-named affiliate—was *not* a "real party in interest" that would destroy jurisdiction if it had been sued. Moreover, the Fourth Circuit concluded that EQR, a limited partnership, was a Virginia citizen based on its purported "nexus" to Virginia, even though none of its partners is a citizen of Virginia. That analysis could deprive limited partnerships in the real estate business of their right to

remove a case to federal court in any state in which the partnership owns, leases, manages, or is developing property.

Because they operate through many entities—including limited partnerships—in different states, real estate businesses will be disproportionately penalized under the Fourth Circuit's rule. The decision below creates a potential diversity-destroying engine for such entities and thus may deprive businesses of their right to seek an impartial federal forum.

IV. THIS COURT'S REVIEW IS NEEDED TO ESTABLISH NATIONAL UNIFORMITY ON THE JURISDICTIONAL QUESTIONS PRESENTED

As explained in the petition, the Fourth Circuit's decision implicates two circuit conflicts over the proper approach for determining "citizenship" for purposes of establishing diversity jurisdiction. First, the Fourth Circuit's decision deepens an existing conflict over whether courts may look beyond the named defendants to determine whether a different entity would destroy diversity under a "real party in interest" analysis. The Fourth and Seventh Circuits embrace such analysis. *See, e.g., Indiana Gas Co.* v. *Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998), *cert. denied*, 525 U.S. 931 (1998). By contrast, the Eighth and Tenth Circuits have confined the "real party in interest" analysis to determining the citizenship of the party pursuing the action, and the Second, Third, Fifth, and Sixth Circuits have held that courts should not apply the "real party in interest" concept to non-named defendants for the purpose of destroying diversity.[5]

[5] *See, e.g., E.R. Squibb & Sons, Inc.* v. *Accident & Cas. Ins. Co.*, 160 F.3d 925, 939 (2d Cir. 1998); *Chemical Leaman Tank Lines, Inc.* v. *Aetna Cas. & Sur. Co.*, 177 F.3d 210, 223 & n.16 (3d Cir. 1999); *Corfield* v. *Dallas Glen Hills LP*, 355 F.3d 853, 864 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2421 (2004); *Certain Interested Underwriters at Lloyd's* v. *Layne*, 26 F.3d 39, 43 (6th Cir. 1994); *Consul General* v. *Bill's Rentals, Inc.*, 330 F.3d 1041, 1045 (8th Cir. 2003); *Esposito* v. *United States*, 368 F.3d 1271, 1273 (10th Cir. 2004).

Second, the Fourth Circuit's decision creates a conflict over the application of the rule established by *Carden* and reaffirmed in *Grupo Dataflux* that the citizenship of a limited partnership is governed by the citizenship of its partners. As discussed above, the Fourth Circuit reasoned that the "nexus" between a limited partnership and a state may be sufficient to destroy diversity—regardless of whether the citizenship of the partners is diverse. Pet. App. 16a. The First, Second, and District of Columbia Circuits, however, have refused to determine the citizenship of a partnership based on its activities and instead have limited that inquiry to the citizenship of its partners. *See Taber Partners* v. *Merit Builders, Inc.*, 987 F.2d 57, 63 (1st Cir. 1993); *ConnTech Dev. Co.* v. *University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 681 (2d Cir. 1996); *Anchorage-Hynning & Co.* v. *Moringiello*, 697 F.2d 356, 357 n.1 (D.C. Cir. 1983) (per curiam).

The resolution of circuit splits is particularly important when it comes to jurisdictional rules. Diversity jurisdiction offers an important gateway to the federal courts and is invoked by businesses and individuals tens of thousands of times each year. *See* Pet. 2. The threshold for establishing diversity of citizenship should be the same in every federal court and should be based on clear and predictable rules. The conflicts that are implicated by the decision below directly impact the thousands of real estate and management businesses nationwide that operate in multiple states through various affiliates. These enterprises are now subject to different rules and potentially different outcomes with respect to a critical jurisdictional determination. The Court should grant certiorari and establish national uniformity on the important jurisdictional questions presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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ADDENDUM

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DESCRIPTION OF AMICI CURIAE

American Hotel & Lodging Association. The American Hotel & Lodging Association (AH&LA) is a dual membership association of state and city partner lodging associations throughout the United States. AH&LA was established in 1911 and is based in Washington, D.C. AH&LA has some 10,000 property members nationwide, representing more than 1.4 million guest rooms. It provides members with advocacy on Capitol Hill, research and information on the lodging industry, and other services designed to ensure a positive business climate for the U.S. lodging industry.

American Resort Development Association. The American Resort Development Association (ARDA) is a Washington, D.C.-based trade association representing the vacation ownership and resort development industries. The ARDA was established in 1969 as the American Land Development Association and today has nearly 1000 members, ranging from privately held companies to major corporations, which are located and do business in the United States and overseas.

Building Owners and Managers Association. The Building Owners and Managers Association (BOMA) International is an international federation of 108 local associations. BOMA International's 19,000 members own or manage more than nine billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.

Institute of Real Estate Management. The Institute of Real Estate Management (IREM) has been the source for education, resources, information and membership for real estate management professionals for more than 70 years. IREM is an affiliate of the National Association of Realtors

and is the only professional real estate management association serving both the multi-family and commercial real estate sectors. The IREM has 82 chapters in the United States as well as eight international chapters. IREM serves as an advocate on issues affecting the real estate management industry. Membership includes nearly 16,000 individual members and 530 corporate members. Collectively, IREM's members manage more than 6.5 billion square feet of commercial space and more than 13 million residential units, totaling more than $848.2 billion in real estate assets.

International Council of Shopping Centers. The International Council of Shopping Centers (ICSC) is a global trade association representing the interests of the shopping center industry. The ISC was founded in 1957 and has more than 50,000 members in the United States and elsewhere around the world representing owners, developers, retailers, lenders, and other professionals. Nearly 45,000 of the ICSC's members are in the United States and represent nearly all the 46,990 shopping centers in the United States.

National Association of Homebuilders. The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association representing more than 220,000 members involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. The NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members constructed about 80 percent of the more than 1.77 million new housing units in 2004.

National Association of Industrial and Office Properties. The National Association of Industrial and Office Properties (NAIOP) is the nation's leading trade association for developers, owners, investors and asset managers in industrial, office, and related commercial real estate. NAIOP

was founded in 1967 and is comprised of more than 12,000 members in 50 North American chapters. It provides networking opportunities, educational programs, research on trends and innovations and strong legislative representation.

National Association of Real Estate Investment Trusts. The National Association of Real Estate Investment Trusts (NAREIT) is the national trade association for REITs and publicly traded real estate companies with a combined market capitalization of about $294 billion. Members are real estate investment trusts (REITs) and other business entities that own, operate, and finance income-producing real estate, as well as firms and individuals who advise, study, and service those businesses. NAREIT's principal mission is to communicate about REITs and real estate investment to members, policymakers nationwide, the investment community, the media, and the public. NAREIT regularly represents the REIT and real estate investment community before Congress and the Executive Branch, provides research on the REIT industry, and publishes information about REITs.

National Association of Realtors. The National Association of Realtors (NAR) is a non-profit association that represents more than one million members engaged nationwide in all phases of the real estate business, including brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. NAR's members contribute to such activities as safeguarding real property rights, promoting equal opportunity in housing, real estate licensing, neighborhood revitalization, and public service, and promoting cultural diversity.

National Multi Housing Council and the National Apartment Association. The National Multi Housing Council and the National Apartment Association (NMHC and NAA) represent the nation's leading firms participating

in the multi-family rental housing industry. The combined memberships of NHMC and NAA are engaged in all aspects of the apartment industry, including ownership, development, management, and finance. The NMHC represents the principal officers of the apartment industry's largest and most prominent firms. The NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. The NAA is the largest national federation of state and local apartment associations and is comprised of 164 affiliates and represents more than 31,505 professionals who own and manage more than five million apartments across the country. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

The Real Estate Roundtable. The Real Estate Roundtable (Roundtable) is a federal policy organization comprised of real estate industry leaders. Its members are the Chairmen, Presidents, and CEOs of the nation's 100 leading commercial and multifamily firms, and the Managing Directors of major financial institutions. The Roundtable also includes the elected leaders and executive directors of major real estate trade organizations. The Roundtable serves as the vehicle through which industry leaders come together to identify, analyze, and advocate policy positions on issues important to the national real estate community. The Roundtable's business and trade association leaders work collectively to ensure a cohesive industry voice is heard by government officials and the public about relevant real estate policies. Collectively, Roundtable members hold portfolios containing over 2.5 billion square feet of developed property valued at more than $250 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.

(3)

Supreme Court, U.S.
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No. 04-712

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY and
STATE OF WISCONSIN INVESTMENT BOARD,

Petitioners,

v.

CHRISTOPHE ROCHE and JUANITA ROCHE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit's judgment pronounced any new diversity of citizenship standard for an unincorporated business association.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Christophe Roche and Juanita Roche are individual United States citizens and are not corporations or publicly owned companies.

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INTRODUCTION

The "Question Presented" is answered in the negative. The Fourth Circuit opinion offered no new standard for determining diversity of citizenship jurisdiction. *Roche v. Lincoln Property Co.*, 373 F.3d 610 (4th Cir. 2004), was simply a case where the court found that the removing party was some type of unincorporated business entity, and did not carry its burden of proving diversity of citizenship for the named party defendant, Lincoln Property Company. The court applied the *Cardon v. Arkoma Associates*, 494 U.S. 185 (1990), principle to this properly "joined and served" party defendant.

Petitioner raised some interesting academic questions from the circuit court's analysis of the "real party in interest" concept: First, Petitioner suggested that the "real party in interest" concept did not apply to defendants, contending that the court confused it with procedural Rule 17(a). Second, it criticized the Fourth Circuit for deepening a conflict among the circuits when none exists. Third, Petitioner claimed that the court wrongfully applied the principle of the "real party" to a non-named party. Then Petitioner suggested that the *Roche* judgment created a new standard called a "very close nexus" test for determining diversity of citizenship of a limited partnership.

The issue on a "not named" party destroying diversity has been decided by this Court. However, that question is irrelevant because whether Lincoln was either in a limited partnership or some other unincorporated association, the "persons composing" test would still have been employed. And for the same reason, the entire exercise discussing the real party to the controversy may have been superfluous.

Roche presented a straight-forward "count each member of the entity" case.

Because of the confusing structure of the Lincoln group of enterprises, and Petitioner's failure to disclose all of the necessary jurisdictional facts, the Fourth Circuit resolved the disorder by analyzing who was the "real party to the controversy." But the court then applied *Cardon*, *supra*, as the purported entity was a limited partnership. The Fourth Circuit's methodology was correct under either analysis. More significant is that for Supreme Court review purposes, the battle over the "real party" analysis of *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980), versus the "citizenship of an artificial entity" was fought and decided in *Cardon*. Further review of these familiar issues is unnecessary, particularly where the circuit court's judgment was right even for ostensibly irrelevant reasons.

Below are introductory responses to Petitioner's "Questions Presented:"

1. The jurisdictional "real party in interest" rule is applicable to both plaintiffs and defendants. The Fourth Circuit applied the rule to the named and served defendant, the entity "Lincoln Property Company." The record demonstrated that Lincoln was a partnership, not a corporation; therefore, the Fourth Circuit considered the citizenship of the members of the unincorporated association (a limited partnership) in accordance with *Cardon* principles.

The Petitioner mistakenly argues that the **jurisdictional** "real party in interest" concept applies only to claimants (plaintiffs), a view that this Court has never taken. The Petitioner confuses the procedural Rule 17(a) with the "never

can be waived" jurisdictional rule on diversity of citizenship. The Fourth Circuit's holding is consistent with not only this Court's rulings but also all the other circuits.

Petitioner's error stems from their misunderstanding of the "real party to the controversy" concept as discussed in *Navarro* and *Cardon*. The real party in interest rule has guided courts in the application of the diversity jurisdiction statute whenever the named parties were not the parties considered for diversity. As stated in *Navarro*, a rough symmetry came about between procedural Rule 17(a) and the jurisdictional real party in interest rule, but the jurisdictional rule continues as the general rule governing which parties are relevant for jurisdictional purposes. This Court reaffirmed the jurisdictional "real party in interest" rule in *Lumberman's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), where the jurisdictional rule was applied to the defendant party.

The Fourth Circuit's discussion in reference to the real party in interest rule neither raises nor creates conflict among the circuits. The decision of the Fourth Circuit was consistent with long-standing precedence, involved no new question of federal law, and presented no issue of federal law with significant practical consequence. The Petitioner's argument is very creative but demonstrates merit less matter for review because of its misconception of the jurisdictional rule.

2. The *Roche* court never pronounced a new diversity test for determining citizenship of a limited partnership. The "very close nexus" words used by the Petitioner were taken entirely out of context and spun by Petitioner in its attempt to hopefully make its Petition "certworthy." The Fourth Circuit was using the "very close nexus" words

in an explanation of federalism and the purpose of the policy behind diversity jurisdiction. Petitioner has mischaracterized this dicta discussion into a claim that the judgment created a new diversity test, something just as twisted and mistaken as its first question presented which claimed that the real party in interest concept does not apply to defendants.

The *Roche* decision was simply a case where the removing defendant did not carry its burden in establishing diversity (the district court mistakenly shifted that burden to the plaintiff), and the district court erred by weighing evidence in favor of the removing party. The Petitioner has tried to conjure up a split when none exists; the issues are all well settled and have been addressed by the Supreme Court on numerous occasions.

COUNTER-STATEMENT OF THE CASE

The Respondents adopt the statement of the facts as set forth by the Fourth Circuit in the underlying opinion, *Roche* at 612-613. These facts show that the named and served defendant, Lincoln Property Company, was a partnership with a Virginia partner. *Id.* at 616. Lincoln complemented its own company's Rule 30(b)(6) designee's testimony that "Lincoln was a partnership" by submitting confusing declarations. *Id.* at 617-19. These submissions identified other **partners** of Lincoln who had an interest in the controversy. ["Nonetheless, at oral argument and in its briefs, Lincoln admitted that 'the entity that receives the management fees for Westfield Village Apartments' is 'EQR/Lincoln Limited Partnership.'" *Id.* at 618.]

The Fourth Circuit used the jurisdictional "real party in interest" concept to conclude: first, that Lincoln was a named and served defendant (plaintiffs claimed that Lincoln was a nominal party and "that Lincoln's Virginia entity was the real and substantial party in interest, without whom they cannot be made whole. And, Lincoln has been made a party to the lawsuit." *Id.* at 615 n.5); second, since the record demonstrated that the named/served Lincoln party was a limited partnership, *Cardon* was applicable, whereby all members of the entity had be shown to be diverse; and, third, Lincoln could not prove diversity for a number reasons, including that in examining the citizenship of its **corporate** partners, Petitioner had placed in the record mere conclusory allegations, not facts to support the "principal place of business" test, and had not identified all the limited partners. The holding of the *Roche* judgment was simply this: "At the end of the day, the burden of establishing diversity remained upon Lincoln. And, Lincoln failed to carry its burden." *Id.* at 621.

Respondents point out the following perceived misstatements of fact and law in the Petition pursuant to Supreme Court Rule 15(2):

1. Petitioner states as a reason for granting the petition: "A clear majority of circuits, on the other hand, hold that the 'real party in interest' analysis applies only to determining a *plaintiff's* citizenship and not a defendant's at all." Pet. 8. No cases cited by the Petitioner, nor academic article, Law Review, treatise or otherwise, suggest such a schism exists among the circuits concerning applicability of

the jurisdictional rule to plaintiffs, and not defendants.[1] [The Petitioner's reference to 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543, at 339 (2d ed. 1990), at p. 11 of its Petition is misplaced. There, it refers to the procedural rule, which can be waived if not timely challenged. For history and purpose of Rule 17, *see id.* at § 1541.]

2. The Court of Appeals did not hold that the citizenship of a non-named entity, which was a limited partnership, must be determined by its supposedly "very close nexus" to Virginia rather than solely on the citizenship of its members. The context of the once used words "a very close nexus" with Virginia is found at 373 F.3d at 621. There, the court is in the midst of discussing the elementary policy behind diversity jurisdiction. The court goes on to explain the purpose of diversity jurisdiction is to provide a tribunal free from local prejudice. In that discussion, it mentions that the nominal named party defendant, Lincoln Property Company, is not alien to Virginia, and that the ostensible real party in interest "owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth . . ." This is mere dicta, which discusses why the defendants in this particular case should not have concerns that a state tribunal cannot provide a fair trial. *Id.* at 620-21.

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1. However, commentators do suggest that Rule 17(a) of the Federal Rules of Civil Procedure sometimes creates confusion, as it did to the Petitioners, because of its association with the diversity of citizenship real party jurisdictional rule. Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 1967, 51 Minn. L. Rev. 675, 724.

3. Petitioner's argue that the *Roche* judgment deepens an existing conflict among the circuits on whether a non-named defendant can destroy diversity. *Roche* did not hold that; rather, it held that Lincoln Property Company was a named and served party which was in a partnership with the other general or limited partners whose citizenship was never proven.

4. The Fourth Circuit's decision did not address the merits of the plaintiff's initial appeal from the district court. "Finding that we lack subject matter jurisdiction, we can not address the merits of the case." *Id.* at 622.

5. Petitioner attached "Appendix J," found at page 96(a) of their Petition a diagram that is inaccurate. While the top box shows "EQR/Lincoln Limited Partnership" having a general partner and a limited partner, it neglects to have a third line coming out from the top box showing another limited partner, namely Lincoln Eastern Management Corp., which according to the Partnership Agreement of EQR/ Lincoln Limited Partnership is both a general partner and a limited partner. *Id.* at 618-19, and n.11 at 618-19.

6. While Petitioner Lincoln claims they presented extensive declarations of general counsel for corporations and limited partnerships (Pet. 4-5), these statements only contained mere conclusions, stating such things as "the principal place of business" of the entity is such and such. Lincoln never presented the *facts* or the *underlying basis* for making these statements. The *Roche* court stated it best: "When jurisdiction is challenged, courts generally do not accept the *carte blanche* naked allegations of diverse citizenship or bald assertions of jurisdictional facts." *Id.* at 617.

REASONS FOR DENYING THE PETITION

I. Lincoln Has Not Articulated A Compelling Reason To Justify Discretionary Review By This Court

Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction when the law is so well settled and no conflict exists in the circuits on the issue. The patently mistaken argument of Lincoln, claiming that there is a split in the circuits in that some hold that the "real party in interest" analysis applies to only determining a *plaintiff's citizenship and not a defendant's at all* (Pet. 8) is nowhere to be found in any of the cases they cite for that proposition. The second claim of Lincoln is a misstatement of the Fourth Circuit's Opinion. The Fourth Circuit never held that the citizenship of a limited partnership is determined by a "very close nexus" analysis.

Even if the Court perceives that confusion exists over the "real party in interest" jurisdictional rule because of the dicta discussion in *Roche*, this is not the case to grant a review. The *Roche* case is a true *Cardon* set of facts—the defendant's own evidence demonstrated it was a partnership; therefore, each member of the unincorporated association or limited partnership must be shown to be diverse.

II. The Question Presented By Petitioner Of Whether An Entity Not Named As A Defendant In The Lawsuit Can Nonetheless Be Deemed A "Real Party In Interest" To Destroy Diversity Of Citizenship Has Been Answered But Is Irrelevant In A "Persons Composing" Test Case

A. The Supreme Court Has Applied The "Persons Composing" Test To All Forms Of Unincorporated Associations (Except For A Business Trust Like In *Navarro*) And Since Lincoln Was Treated Like A Partnership, This Issue Is Moot

Petitioner completely baffled everyone as to the type of entity it was. "Given the manner in which Lincoln conducts business (using many different structures) and the confusion which is created thereby," it even confused the circuit court. *Roche*, at 621 n.16. As a result the court treated Petitioner as an unincorporated association. This Court has consistently required that all members of such entity to be diverse from that of the opposing party. *Chapman v. Barney*, 129 U.S. 677 (1889), where a joint stock company was not treated as a corporation; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), involving a "limited partnership association;" and in *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1945), a labor union.

The Fourth Circuit correctly applied *Cardon*, in which each person composing the limited partnership was counted. But since Petitioner could not, or would not, disclose all of the necessary "partners" and jurisdictional facts, "[T]he negative inferences resulting from these obscurities, however, must be borne by Lincoln, who created them, not the Roches and not the federal courts." *Roche*, at 619-620. Accordingly, the court did not need to examine a "not named" defendant;

Petitioner simply did not carry its burden in proving the citizenship of these members of the unincorporated association.

B. This Court Has Examined An Entity Not Named As A Party To Find A Lack Of Diversity Of Citizenship

In *Chapman*, *supra*, the Court found that the record did not show the citizenship of any members of the joint stock company, which members were not named parties to the lawsuit. The same was done in *Great Southern*, *supra*, and in *Bouligny*, *supra*, the latter case where the not named members were defendants who destroyed diversity jurisdiction.

III. There Is No Circuit Split On The Question Presented

A. The Law Is Clear On The Jurisdictional Rule

Lincoln misunderstands the real party in interest concept as a jurisdictional rule. It has confused the procedural rule of having to name a real-party-in-interest under Rule 17(a) with the jurisdictional rule for testing subject matter jurisdiction on the basis of diversity of citizenship. Ironically, the Fourth Circuit and Lincoln both rely upon this Court's decision in *Navarro*.

In *Navarro*, the Court clearly pointed out as follows:

> "There is a 'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy.

> But the two rules serve different purposes and need not produce identical outcomes in all cases. Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L.Rev. 243, 247-250 (1978); see 6 C. Wright & A Miller, Federal Practice and Procedure § 1556, pp. 710-711 (1971)." 44 U.S. 462-463, n. 9.

The Texas Law Review note explains that since the early 1800's, the real party in interest rule has guided federal courts in the application of the diversity jurisdiction statute whenever the named parties were not the parties considered for diversity. It states that the rule of jurisdiction is related to the procedural mandate embodied in Rule 17(a) of the Federal Rules of Civil Procedure, but is distinct and older in origin.

> [B]ut the jurisdictional rule continues as a general rule governing which parties are relevant for jurisdictional purposes. . . . The Supreme Court reaffirmed the real-party-in-interest rule, in *Lumberman's Mutual Casualty Co., v. Elbert*, [348 U.S. 48 (1954)], holding that an out of state insurer could be sued in diversity under a state direct-action statute without regard for the citizenship of the insured. 56 Texas L. Rev. 248-249.

In *Lumberman's Mutual*, the Court found that the insurer was not a formal party, but had a substantial legal interest in the action. However, the jurisdictional real party in interest

concept was applied to a defendant. The note points out that even though 28 U.S.C. § 1332(c) has since overruled the direct-action suits as far as insurance cases, the Supreme Court has upheld "determination of the parties relevant for diversity purposes by first considering the parties' substantive rights and liabilities from the point of view of the complaint. If the court finds that a party contesting a suit is merely a nominal party, then it looks to a more appropriate party for diversity purposes." 56 Texas L. Rev. at 249-50.

Also, cases cited in *Navarro* applied the real party in interest concept to both plaintiffs and defendants: *Bouligny*, *supra*; *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 14 L. Ed. 953 (1854); and *St. Louis & S. F. R. Co. v. James*, 161 U.S. 545 (1896); cited by *Navarro*, 446 U.S. at 461; and *Thomas v. Board of Trustees*, 195 U.S. 207 (1904), *Navarro* at 463. *See also Wood v. Davis*, 18 How. 467, 15 L. Ed. 460 (1856), where **defendants** were tested as to whether or not they were parties in interest in deciding diversity jurisdiction.

Petitioner suggests that the Fourth Circuit "conflated" the words "parties in interest" from 28 U.S.C. § 1441(b) with the concept of "real party in interest" of Federal Rule of Procedure 17(a). Pet. 10. But, the Petitioner is the one who misunderstands the concept of the real party in interest as a jurisdictional rule, probably because of its partial reading of a footnote in the case it so heavily emphasized, *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171 (9th Cir. 1979). Pet. 19. There, Petitioner argued "As then-Judge Kennedy explained, '[t]he real party in interest concept is correctly applied *only* to those persons prosecuting an action, not to a defendant.'" *Simpson*, at 1173 n.2 [emphasis added by Petitioner]. Pet. 19. However, the remainder of the footnote revealed that this was referring to the procedural Rule 17, and

that "the district court here clearly intended the nomenclature to mean that the parent corporation was the proper party **defendant** to the action." *Simpson*, at 1173 n.2. [emphasis added].

B. There Is No Massive Uncertainty Over Whether Non-Named Affiliates Will Destroy Diversity Jurisdiction, Causing Panic To The Business Community

Just as there exists no "deep circuit conflict" created by utilization of the "real party in interest" concept, there is no reason to adopt Petitioner's fear that real estate property managers will have no access to the federal courts as a result of *Roche*. If true diversity of citizenship exists between all of the parties, then the federal courts will be open to the diverse entities. For nearly two centuries the precedence of diversity of citizenship has been the character of federal jurisprudence for out of state business entities.

Respondents have been advised that an *amicus* brief will be filed on behalf of real estate interested associations. Anticipating that the realtors' brief will be adopting Lincoln's flawed argument, it is respectfully submitted that all these concerns were questioned and answered in the unanimous decision of *Bouligny*, *supra*, and readdressed in *Cardon*, 494 U.S. at 196-97.

C. The Fourth Circuit's Judgment Pronounced No New Citizenship Test For A Limited Partnership

As explained in the Introduction and in the Counter-Statement of the case, *supra*, Petitioner has taken out of context the use of the words "a very close nexus," which was mentioned one time in dicta. *Roche* at 621. Broken down,

the Fourth Circuit's decision is a very benign and easy to understand holding, which is that the burden of establishing diversity remained with the Petitioner. "And, Lincoln failed to carry its burden." *Id.*

As pointed out by the Fourth Circuit, the issue of diversity was extensively litigated in the district court. Lincoln failed to present facts which could overcome its own "uncontroverted evidence" [*id.* at 616] that Lincoln was a partnership and not a company; that one of its partners, as identified in its Web site and in testimony by another Lincoln official, was an undisputed Virginia resident. In attempting to overcome the affirmative evidence that it was a partnership, Lincoln placed into the evidence convoluted and confusing explanations as to who these partners and partnerships and entities were.

Upon having its diversity of citizenship challenged, Lincoln made conclusory statements, did not present evidence of who were all of its corporate partners, whether limited or general, nor introduced facts to show the location of their principal places of business, one of the criterion for a corporate entity's citizenship. 28 U.S.C. § 1332(c)(1). Yet Lincoln's Petition at page 24 cites and relies on *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1983), a case that demonstrated the type of underlying factual basis necessary for establishing a corporate partner's principal place of business. *Id.* at 59-60.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 04-712

IN THE
Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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February 8, 2005

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page ii of the petition for a writ of certiorari, and there are no amendments to those Statements.

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REPLY BRIEF FOR PETITIONERS

The Fourth Circuit's rules for determining diversity jurisdiction create massive uncertainty for businesses, such as those like Lincoln in the real estate industry. By looking beyond Lincoln, a named defendant, to other entities that the court speculated had an interest in the litigation, the Fourth Circuit deepened a circuit conflict that now includes virtually every circuit in the federal system. Only this Court's guidance can clarify whether (1) it is proper for a court to determine diversity based on putative defendants not named in the complaint; and (2) it is appropriate to gauge the citizenship of a limited partnership by the "very close nexus" (Pet. App. 16a) of its activities with a state, rather than just the citizenship of its individual partners. Both questions warrant this Court's review, and respondents nowhere deny that this case presents an ideal vehicle for addressing them.

Respondents do not contest that diversity of citizenship rules are particularly important to the federal system because of the sheer numbers of filings and that the indeterminant "nexus" inquiry and look-outside-the-complaint approach of the Fourth Circuit are the antithesis of bright-line rules. Nor do they address the court of appeals' cases that conflict with the decision below.

Instead, respondents mischaracterize the Fourth Circuit as holding that Lincoln was a "limited partnership" or an unincorporated business association whose individual members consist of at least one Virginian. The court did no such thing; rather, it did not question that Lincoln Property Company is a corporation and, in fact, is "a Texas citizen." Pet. App. 16a. Moreover, respondents' opposition eschews *any* discussion of the numerous cases that conflict with the Fourth Circuit's rule. Respondents seek to avoid the deep circuit conflict by citing decisions of this Court that supposedly "answer" the question. But those cases are either irrelevant or, when properly understood, contrary to respondents' position. Finally, respondents' opposition obfuscates the second issue by character-

izing the Fourth Circuit's "very close nexus" holding as "mere dicta." Opp. 6. Had the court below stopped when it concluded that Lincoln is "a Texas citizen," it never would have looked at the factual connections between EQR and Virginia. The court's "very close nexus" rule is therefore central to its erroneous holding, and that rule conflicts with the holdings of three other circuits.

I. RESPONDENTS DO NOT CONTEST THAT A CONFLICT EXISTS ON WHETHER THE CITIZENSHIP OF NON-PARTIES IS RELEVANT IN DETERMINING DIVERSITY

A. The Fourth Circuit Rule Unquestionably Looks Outside The Complaint

Central to the Fourth Circuit's erroneous holding was its conclusion that "[d]iversity of citizenship . . . is determined not by reference to the formal or nominal parties but, rather, there must be complete diversity between the real and substantial parties in interest." Pet. App. 6a. Thus, in the Fourth Circuit's view, a court *is required to* look outside the complaint to ascertain whether any non-party putative defendants are the "real and substantial parties in interest." *Id.* Indeed, the court below took the district court to task for failing to venture beyond the named parties: "The court did not determine the citizenship of the real parties in interest." *Id.* at 10a. The Fourth Circuit then *sua sponte* purported to conduct that very analysis, by looking beyond Lincoln Property Company – what it characterized as a "formal" named party – and examining evidence concerning EQR/Lincoln Limited Partnership and Jeff Franzen, one of Lincoln's executives who resides in Virginia and who was allegedly described as a "partner" in a deposition. The court then concluded, "the citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises." *Id.* at 14a. Yet none of the members of this "group of enterprises" other than Lincoln itself was named as a defendant in this case.

Curiously, respondents seek to confuse the issue by mischaracterizing the court's holding. Throughout their opposition (without citation to the court's opinion), respondents repeatedly argue that the Fourth Circuit found that Lincoln "was some type of unincorporated business entity" (Opp. 1), but that was not what the court concluded. Rather, the court agreed that "Lincoln Property Company, is a Texas citizen." Pet. App. 16a. The court then erroneously concluded that "the real and substantial party in interest is the *Virginia subsidiary*, be it a partnership, corporation or otherwise, rather than the Texas parent." *Id.* (emphasis added). Notably, respondents acknowledge by omission that there *is* no such "Virginia subsidiary" of Lincoln. And they do *not* defend the court of appeals' rationale – that it was empowered to look beyond the four corners of the complaint in a free-wheeling search for possible interested defendants. Rather, they seek to defend the judgment below on a ground explicitly *rejected* by the Fourth Circuit – that Lincoln, the parent company, was a partnership instead of a corporation.[1]

B. This Court's Cases Do Not Support Respondents' Assertion That The Citizenship Of Non-Parties Is Relevant

Respondents misrepresent various cases as ostensible authority that this Court has sanctioned courts looking outside the complaint to ascertain putative non-named defendants who would destroy complete diversity.[2] They

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[1] *See* Opp. 4 ("These facts show that the named and served defendant, Lincoln Property Company, was a partnership with a Virginia partner."); *id.* at 5 ("the record demonstrated that the named/served Lincoln party was a limited partnership"); *id.* at 7 (Fourth Circuit "held that Lincoln Property Company was a named and served party which was in a partnership with the other general or limited partners whose citizenship was never proven."); *id.* at 9 ("[T]he court treated Petitioner as an unincorporated association."). Respondents, therefore, have no credibility denying what the Fourth Circuit so evidently did: "the court did not need to examine a 'not named' defendant." *Id.*

[2] Respondents cite (Opp. 9) three cases from this Court which hold that the citizenship of unincorporated associations is treated, for diver-

cite (Opp. 3) *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), for example, and then contend that "the Court found that the insurer was not a formal party, but had a substantial legal interest in the action." Opp. 11. That mischaracterization is difficult to understand, because the insurer *was* a named party. Indeed it was the party who brought the case to this Court, which addressed a situation analogous in relevant respects to the one here. An in-state tort victim had two causes of action under state law, one against the tortfeasor, who happened to be non-diverse; and another against an out-of-state insurance company under a state statutory provision. Instead of suing the in-state tortfeasor, the plaintiff sued the insurer in federal court under diversity jurisdiction. *See* 348 U.S. at 49-50. The insurer, which had certain procedural rights under state law that it wanted to invoke, sought to have the case dismissed for lack of subject-matter jurisdiction on the ground that the tortfeasor was non-diverse from the plaintiff and should be considered. *See id.* at 50.

As the Court framed the issue, "the sole question to be decided is whether the United States District Court in Louisiana has jurisdiction over this suit for damages brought under the direct action statute against the wrongdoer's insurer alone, where diversity of citizenship exists between the complainant and the defendant insurer but not between the complainant and the wrongdoer." *Id.* The Court held that, because the plaintiff did not name the non-diverse tortfeasor as a defendant in the lawsuit,

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sity purposes, as the place where each of its members is a citizen. *See Chapman v. Barney*, 129 U.S. 677 (1889) (joint stock company); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900) (limited partnership association); *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1945) (labor union). Those cases recognize that a corporation – such as Lincoln – is a citizen of its state of incorporation and of the state of its principal place of business. Indeed, *Steelworkers* explained that Congress has now codified that rule in 28 U.S.C. § 1332(c). *See* 382 U.S. at 148 n.4. Thus, respondents have no basis for invoking those cases to defend what the Fourth Circuit did below.

there was no reason to take into account that non-party's citizenship in determining whether diversity was present. *Id.* at 51. As the master of his complaint, the plaintiff was not obliged to sue a non-diverse party, and that non-party's citizenship was irrelevant in determining the diversity of the parties before the court. "Thus a complete disposition of the entire claim may be made in this one action, without injustice to any of the participants." *Id.* at 52. *Lumbermen's Mutual* therefore supports *petitioners'* contention that it was completely improper for the Fourth Circuit to look beyond the complaint to take into account the citizenship of any non-named putative defendants.[3]

Nor do any of the other cases of this Court cited by respondents support the proposition that a court may consider non-parties to destroy diversity. In *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314 (1854), this Court rejected the notion that the citizenship of a corporation was to be assessed by "the persons who act as the representatives, curators, or trustees, . . . and in such capacity are the real parties to the controversy." *Id.* at 328-29. Rather, the Court confirmed the general rule that a corporation is deemed to be a citizen of the state of its incorporation (*id.* at 329), a rule that is applicable here to support the Fourth Circuit's recognition that *Lincoln* is a citizen of Texas, where it is incorporated.

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[3] Respondents confuse a point not relevant here. As the Texas Law Review note (and *Lumbermen's Mutual*) make clear, a court will scrutinize whether all *named* defendants are actually interested in the lawsuit. That is for the purpose of precluding plaintiffs from suing *non-diverse defendants* for the sole purpose of destroying complete diversity. But respondents here did not sue any nominal defendants. The defendants they actually sued are both diverse and substantially interested in the outcome. Thus, this case simply does not present the situation implicated when a nominal defendant is named that would destroy complete diversity. In that situation, it is well settled that a court can *ignore* or *dismiss* the nominal named defendants and jurisdiction can be maintained in federal court. *See, e.g., Burden v. General Dynamics Corp.*, 60 F.3d 213, 217-18 (5th Cir. 1995).

In *St. Louis & S.F. Railway v. James*, 161 U.S. 545 (1896), this Court considered a suit brought by a Missouri citizen against a Missouri railroad corporation that was also "authorized by the law of another state to do business therein" by virtue of its purchase of a railroad and facilities in Arkansas. *Id.* at 563. Confronted with the question whether this Arkansas deal created complete diversity (because the railroad could be deemed a citizen of Arkansas), the Court held "no," because no congressional statute authorized such dual state incorporations and the Court was "unwilling to sanction such an extension." *Id.* That holding has no relevance here.

Finally, in *Wood v. Davis*, 59 U.S. (18 How.) 467 (1856), the Court addressed what has become recognized as the rule that a plaintiff may not join a non-diverse defendant to the lawsuit solely for the purpose of destroying diversity where that "defendant" had no "interest of their own in the subject in controversy." *Id.* at 470. *E.g.*, *Burden*, 60 F.3d at 217-18. Respondents misleadingly say that in this case "*defendants* were tested as to whether or not they were parties in interest in deciding diversity jurisdiction." Opp. 12. But the Court in *Wood* did not sanction a court looking *outside* the complaint to ascertain whether non-named putative defendants might exist that would destroy diversity. Rather, it looked only at the defendants named in the complaint and limited the plaintiff's right to name nominal parties who had no real interest in the outcome of the suit for the apparent purpose of destroying diversity. That concern is not present here, because both Lincoln and SWIB – the only defendants actually named in the complaint – have a substantial interest in the outcome.[4] Neither respondents nor the court below has ever

[4] EQR does have an interest in this lawsuit, but it is in fact diverse, as the district court concluded. Pet. App. 88a. As *amici* Real Estate Roundtable *et al.* note (Br. 7), real estate companies routinely organize themselves so that their business association structures are limited solely to specified functions or the assets of a particular property. Thus, other businesses affiliated with Lincoln do own or manage properties in Virginia that have nothing to do with the apartment complex

identified any Lincoln entity that both has a substantial interest in the outcome of the suit and is a citizen of Virginia – and there is none.

C. The Fourth Circuit's Rule Concededly Conflicts With The Majority Rule And Is A Question Of Surpassing Importance

A substantial and deep conflict now exists between the Fourth and Seventh Circuits, on the one hand, and the Second, Third, Fifth, Sixth, Eighth, and Tenth Circuits, on the other. *See* Pet. 15-19. The Ninth Circuit has issued rulings going in both directions. *See id.* at 19-21. Respondents have no answer to this conflict. Indeed, they neither cite nor discuss those cases, relying instead on their misreading of this Court's precedents for the ostensible proposition that "[t]he jurisdictional 'real party in interest' rule is applicable to both plaintiffs and defendants." Opp. 2. No decision of this Court cited by respondents stands for that proposition, and the courts of appeals are in open conflict on that question. *See* Pet. App. 7a (acknowledging with "*But cf.*" cite the conflict with *Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 252 (5th Cir. 1973)[5]); Pet. 16 & n.9 (Seventh Circuit in *Indiana Gas* explicitly recognizes the conflict).[6]

that is the subject of respondents' lawsuit. For purposes of ascertaining diversity of citizenship for Lincoln in *this* suit, those entities are entirely irrelevant. Until the Fourth Circuit's decision below, citizenship of a defendant has never been treated like personal jurisdiction minimum contacts where a "nexus" becomes the determining element.

[5] The Fifth Circuit has long held that position, which it reiterated recently in *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 864 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2421 (2004). *See* Pet. 16.

[6] Respondents assert that *petitioners* are "confused" about the relationship between the "real party in interest" inquiry under Federal Rule of Civil Procedure 17(a) and the "jurisdictional" rule. Opp. 10. *See also id.* at 12 (criticizing petitioners' reliance on *Simpson*). But then-Judge Kennedy's opinion explained precisely the correct jurisdictional rule to apply: "A plaintiff ordinarily is free to decide who shall be parties to his lawsuit." 608 F.2d at 1174. Just as the Ninth Circuit there refused to see the relevance of a non-diverse subsidiary – because

The issue is one of particular importance to businesses – like those in real estate – that establish separate business entities to purchase, develop, or manage properties. Because of finance, taxation, and other business considerations, such businesses routinely structure their affairs in the way that Lincoln and its affiliates have here. *See Amici* Real Estate Roundtable Br. 7. There is nothing improper about that. But a court has no basis – contrary to the Fourth and Seventh Circuits' holdings – to engage in a wide-ranging exploration into the business affairs of entities that are not named in a lawsuit in order to deny a properly named and completely diverse defendant its statutory right to remove a case to federal court.

II. THE FOURTH CIRCUIT'S "VERY CLOSE NEXUS" HOLDING IS A NEW RULE THAT CONFLICTS WITH THREE OTHER CIRCUITS

A. The "Nexus" Language Is Necessary To The Court's Erroneous Holding

Respondents contend that the "very close nexus" language is "taken entirely out of context" and "spun" by petitioners. Opp. 3. *See also id.* at 13. Respondents also suggest that the "very close nexus" test is "mere dicta." *Id.* at 6. But, without that test, there was simply no basis for the Fourth Circuit to go beyond its conclusion that Lincoln Property Company "is a Texas citizen." Pet. App. 16a. That conclusion alone should have sufficed to affirm the district court's exercise of subject-matter jurisdiction. It was only when the Fourth Circuit engaged in a fishing expedition through entities and persons affiliated with Lincoln (that are unrelated to this lawsuit) that it came to the conclusion that Lincoln had failed to carry its burden of establishing diversity. *See id.* at 15a, 18a. Thus, the "very close nexus" test was the legal rule that purported to justify the Fourth Circuit's *sua sponte* examination of

---

the plaintiff had not sued that entity – the Fourth Circuit here should not have speculated about the existence of a Lincoln "subsidiary" (that in fact does not exist) that would destroy diversity. *Simpson* is directly on point and directly in conflict with the decision below.

extraneous (and irrelevant) facts. And it was those "facts" about Lincoln's supposed "nexus" to Virginia through its imagined "Virginia subsidiary" (*id.* at 16a) that became the *sole* basis for its conclusion that Lincoln had failed to meet its burden of establishing diversity (*id.*). By holding that an inquiry into "nexus" was necessary, the Fourth Circuit created a new rule of law that is in conflict with that of three other circuits, and then applied it using facts not found in the record without affording Lincoln an opportunity for briefing, argument, or further evidentiary development. The court below's "confusion" about how Lincoln conducts its business simply reflected the court's own rush to judgment.[7]

B. The Fourth Circuit's Rule Creates A Circuit Conflict

Respondents cite *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1993), as "demonstrat[ing] the type of underlying factual basis necessary for establishing a corporate partner's principal place of business" (Opp. 14), but they misunderstand the importance of that case. The First Circuit there rejected the very nexus rule that the Fourth Circuit here applied. In *Taber Partners*, the lawsuit concerned consulting and renovation contracts for a hotel in Puerto Rico owned and operated by the defendant general partnership whose partners were corporations. *Id.* at 58. The First Circuit *reversed* a judgment that had placed "greater significance" for determining the citizenship of the partnership on "the location of the corporations' primary activity" – Puerto Rico. *Id.* at 60 ("We do not concur in the district court's analysis."). Instead,

---

[7] To the extent that respondents offer any response, it is off-point. Respondents assert that Lincoln "made conclusory statements" and otherwise failed to present the requisite facts. Opp. 14. But the district court had no trouble discerning the controlling facts on the basis of the proper legal standards: to look only at the defendants actually named in the complaint and, upon indulging respondents' contentions about EQR, to examine the *citizenship* of EQR's (wholly diverse) partners and not the "nexus" of that entity with Virginia.

the First Circuit rested on the traditional factors for determining citizenship that the court below disregarded. *Id.* at 61 ("[T]he separate corporate identities of a parent and subsidiary should be honored when determining either one's principal place of business."). Notably, respondents ignore that the decision below directly conflicts with the Second and D.C. Circuits. *See* Pet. 23-24 & n.12.

C. The Importance Of The Question For The Real Estate Industry Is Undeniable

As the *amici* Real Estate Roundtable *et al.* make clear, the Fourth Circuit has deepened circuit conflicts on issues that affect the daily operations of entities throughout the real estate industry. Respondents seek to defend the judgment below on the ground that forcing petitioners to defend their suit in state court is not unfair, in light of Lincoln's supposed property ownership and other business interests in the state. Opp. 6. But that is precisely the kind of indeterminate balancing test that leads to confusion and inconsistency in application. This Court has long favored bright-line rules in determining jurisdiction, and this supposed "fairness"-based "nexus" inquiry is the antithesis of a bright line, which is vital to serving the goal of "minimizing litigation over jurisdiction." *Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1929-30 (2004). Associations representing every facet of the real estate business have explained how the Fourth Circuit's judgment sows massive and unnecessary confusion. This Court's plenary review is clearly warranted to clarify these bedrock jurisdictional principles.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

BEST AVAILABLE COPY

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February 8, 2005

(4)

Supreme Court, U.S.
FILED
FEB 8 - 2005
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No. 04-712

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY and
STATE OF WISCONSIN INVESTMENT BOARD,

Petitioners,

v.

CHRISTOPHE ROCHE and JUANITA ROCHE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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COUNTER-STATEMENT TO STATEMENT OF INTEREST OF AMICI CURIAE

Respondents, in accordance with Supreme Court Rule 15(2), state the following:

1. The Amici Curiae state that it is undisputed that Petitioner, Lincoln Property Company, is a Texas Corporation. The record in this case and the Fourth Circuit's review of the same disagree with that assertion. The Appendix to this brief demonstrates the inaccuracy of that claim, as well as the declaration found at page 3 of the Amici brief: ". . . defendant that is undeniably diverse".

2. Amici wrote at page 13 that it is undisputed that neither defendant is a citizen of Virginia. This is a misstatement because the Respondents' Motion to Remand in the district court included an argument that there was a lack of subject matter jurisdiction on the basis that Defendant SWIB was an arm of the State of Wisconsin and, therefore, not a citizen for diversity purposes. *Roche v. Lincoln Property Co.*, 373 F.3d 610, 613 (4th Cir. 2004). The circuit court found there was a lack of subject matter jurisdiction because Lincoln could not prove diversity of citizenship; therefore, SWIB's citizenship for diversity purposes was not addressed, nor was the merits of the case. *Id.* at 622.

3. Contrary to the *Amici's* interpretation of the *Roche* decision, the Fourth Circuit did not look beyond the citizenship of the defendant named in the complaint to identify a non-named affiliate to destroy jurisdiction. The *Roche* decision held that Lincoln, as named in the complaint, had not proven itself to be a corporation at all, but rather a partnership. This was based upon the uncontroverted

evidence and Petitioners' insufficiency in supporting the record with jurisdictional facts to overcome the doubt it had created by its own spokespersons' statements and confusing submissions.

4. The *Roche* decision did not instruct, as claimed by Amici, that the citizenship of a non-named limited partnership may be based upon its "nexus" to the state in which the lawsuit is filed, as opposed to the citizenship of its partners. The *Roche* decision instructed that if a named removing party which has its citizenship challenged does not place in the record sufficient and reliable evidence to carry its burden of proving diversity of citizenship, the case should be remanded to state court.

5. Lincoln is not only a member of the National Multi-Housing Counsel and the International Counsel of Shopping Centers, but also has an officer who serves on the Executive Committee of NMHC. Lincoln's partner in the *Roche* case, EQR, has an officer who is on the Board of Directors of the National Apartment Association; and an official of Lincoln is the NAA PAC coordinator; and another Lincoln officer is in charge of the NAA Leadership Lyceum. The Real Estate Round Table is comprised of seven of the ten Associations who claim to be Amici Curiae.

6. The *Amici* stated at page 15 of its brief that Lincoln answered the complaint fully prepared to satisfy any award against it, but the record suggests otherwise. When questioned about payment for any possible exemplary damages and that Lincoln's net worth financials were needed, Lincoln stipulated that it was the limited partnership, EQR/ Lincoln Limited Partnership, which was going to be responsible.
App. G, 19a-20a.

7. The Amici brief adopted the same sophism as Petitioner when it stated that the *Roche* case holds that citizenship may be based on a partnership's purported "nexus" to a state rather than the citizenship of its partners. The circuit court clearly pointed out that "the citizenship of a limited partnership is determined by reference to **all** of its partners." *Id.* at 618. [emphasis was that of the circuit court]. A second time on that same page the court the stated: "As Lincoln no doubt concedes, however, the citizenship of a limited partnership is determined by the citizenship of **all** of its partners, **both limited and general**." *Id.* [emphasis added by the court, which also cited to the joint appendix and to *Cardon*, 494 U.S. at 192-93].

RESPONSE TO AMICI ARGUMENT

The Amici's only new matter argued is the contention that the circuit court "appeared to fault Lincoln for its decision to do business through different entities." Amici, at 7. The brief then explains the purposes of a Special Purpose Entity. Nowhere in the *Roche* opinion did the court criticize or fault Lincoln for utilizing a "SPE" or any other type of business structure. What the court did find was that Lincoln's designated Federal Rule of Civil Procedure 30(b)(6) spokesperson continually and unequivocally denied that Lincoln was a corporation, but a partnership. *Roche* at 616, and please see App. B. There, Mr. Chaney insists that Lincoln does not have a board and is a partnership (App. 4a); that he works for a partnership and when given another chance to deny it when questioned, "Now, Lincoln, as you say, is a partnership?" answers "Yes." (App. 5a). When asked about its stock and whether it is traded, he once again agrees that it is a partnership therefore not a traded stock entity. App. 6a. (Lincoln's counsel at the deposition never

objects to that characterization, or asks Chaney any clarifying questions.)[1]

The problem with *Amici's* misleading argument is the same as Petitioners' analysis of the *Roche* decision — it ignores the obvious finding of the circuit court which is that Lincoln proved itself to be a partnership, not a corporation. (*See* Appendix and *Roche*, at 616-619.) *Amici* and Lincoln have spun the dicta discussion on the concept of the "real party in interest" into an assertion that the decision established a new jurisdictional rule.

The Plaintiffs sued Lincoln Property Company because that is who advertised themselves as the property managers and who appeared in the lease. Prior to filing suit Plaintiffs ascertained that Lincoln ostensibly was incorporated in Texas and accordingly that it was a Texas citizen, and so alleged this in its original state-filed action (in Virginia it is called a "Motion for Judgment"). But, discovery in the case demonstrated that Lincoln was not only a citizen of Texas, but because it advertised and declared itself as a partnership, it was also a citizen of many other states, including Virginia, where one of its partners resided.

1. Another Lincoln official describes one of Lincoln's partners, Jeff Franzen, as the highest ranking officer at the Herndon, Virginia, office. App. C, 10a-12a. The company's web-site identifies the partners in Lincoln, including "Jeff B. Franzen" as an officer and operating partner for Lincoln Property Company. App. D, 14a. Answers to Interrogatories are signed by Jeff B. Franzen as a Senior Vice President/Partner, and in the affirmation, he identifies himself as the Senior Vice President and Partner for Defendant Lincoln Property Company, and authorized to act for Lincoln. App. E, 15a-16a. In complying with Federal Rules of Civil Procedure 26(a)(1)(A), the "initial disclosures" Jeff Franzen is identified as a Senior Vice President and Partner for Lincoln Property Company. App. F, 17a-18a.

Because Lincoln never placed in the record sufficient facts to show whether or not some of its corporate partners, such as EQR/Lincoln Limited Partnership partners resided in Virginia; or whether or not some of its corporate partners had their principal place of business in Virginia, Lincoln left a lot of doubt concerning the citizenship of its partners, both limited, general, and corporate partners. [A *corporate* partner is a citizen of its place of incorporation as well as its principal place of business. *Tauber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1993), a case cited and substantially relied upon by Lincoln and Amici in their arguments.]

The Fourth Circuit's decision was a fundamental determination that Lincoln, as the removing party, did not carry the burden of proving its diversity of citizenship. The only reason to grant *certiorari* would be to affirm the *Roche* decision and further caution of the necessity to clearly establish in the record that diversity of jurisdiction exists, particularly when it is challenged by a remanding motion. However, this lesson has been well-defined by this Court numerous times.[2] The law is clear that the burden is on the removing party to

2. The burden of establishing federal jurisdiction is placed upon the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). Because removal jurisdiction raises significant federalism concerns, this Court must strictly construe removal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

> The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business. [citations omitted].

Northbrook National Ins. Co. v. Brewer, 493 U.S. 6, 18-19 (1989).

demonstrate diversity, and the rules of construction will weigh all doubt against the removing party because of federalism concerns.

Congress recognized this same principal when it decided that an imprudent removal cannot be made with impunity (an order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal.) 28 U.S.C. § 1447(c).

The *Roche* court looked at the same uncontroverted evidence in the motion to remand that the district court had before it. *Roche* at 616. The circuit court then concluded that Lincoln had not carried its burden in showing that it was not an unincorporated association; and, therefore, it should be treated as a partnership for diversity purposes.[3] This Court's review is not needed because there is no conflict over the rule established by *Cardon* and reaffirmed in *Grupo Dataflux v. Atlas Global Group, LP*, 541 U.S. 567 (2004), that the citizenship of a limited partnership is governed by the citizenship of its partners.

---

3. The *Roche* court did not fault Lincoln for operating under numerous different entity structures, but explained that if one does operate in that fashion, it must carry its burden of proving the citizenship in accordance with the applicable rule of law, in this case, *Cardon v. Arkoma Assocs.* While the *Amici* claimed there is "nothing unusual or improper about Lincoln's business structure," there is something questionable when Lincoln so convolutes itself within multiple structures such that tenants as the Roches cannot figure out who and what "Lincoln Property Company" is. For instance, when it signed the Lease on behalf of SWIB, the owner and landlord, Lincoln did so through the entity known as "Lincoln Property Company ECW, Inc., Agent," [App. H, 21a-24a] an entity and name that is different from all others involved in this case and which was never explained in any of the submissions or declarations placed in the record by Petitioners.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted, and the judgment below affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM MEMORANDUM IN SUPPORT OF MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION DATED APRIL 22, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, et al.,

Plaintiff

v.

LINCOLN PROPERTY CO., et al.,

Defendant

MEMORANDUM IN SUPPORT OF MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION

I. SUMMARY OF RELIEF REQUESTED:

If at any time prior to final judgment it becomes clear that the removal court lacks subject matter jurisdiction, the removal court must remand the case to the state court from which the defendants originally removed the case. 28 USC § 1447(c). If the Federal Court lacks subject matter jurisdiction, remand is mandatory and not reviewable on appeal. The Court strictly construes removal status because

of federalism concerns. Where the need to remand is not self-evident, the Court must resolve any ambiguities concerning the propriety of removal in favor of remand.

For the reasons stated below, it is clear that there is a lack of subject matter jurisdiction because the numerous entities of Lincoln Property Co., including the one that is managing Westfield Village and accepting the management payments are not Texas Corporations. In actuality, it is a partnership conducting business in the Commonwealth of Virginia.

* * * *

APPENDIX B — EXCERPTS FROM DEPOSITION OF FRED E. CHANEY DATED FEBRUARY 13, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (JBL)

February 13, 2003

CHRISTOPHE ROCHE, ET AL.

Plaintiff

vs

LINCOLN PROPERTY CO., ET AL.

Defendant

DEPOSITION OF:

FRED E. CHANEY

was called for examination by Counsel for the Plaintiff, pursuant to Notice, taken at the law offices of Jerry M. Phillips, Esquire, Phillips, Beckwith, Hall & Chase, 10513 Judicial Drive, Suite 100, Fairfax, Virginia 22030, commencing at 1:10 p.m., on the 13th day of February, 2003, before Mary Silverthorne, a Notary Public in and for the State of Virginia, at Large, when were present on behalf of the respective parties:

* * *

Appendix B

[4] Thereupon,

FRED E. CHANEY

the witness, called for examination by Counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. PHILLIPS:

Q Would you please state your name and address?

A Fred Chaney, 4028 Centenary -- that's C-e-n-t-e-n-a-r-y -- Dallas, Texas.

Q And would you please tell us what your occupation is and your position?

A I am property manager for Lincoln Property Company and Senior Vice President.

Q And do you sit on the board of Lincoln Property?

A We're a partnership. I am a partner in new deals. We don't have a board.

Q And this is a limited liability corporation or company?

A We have multiple structures that we

* * *

Appendix B

[18] * * *

A The partnership that I work for does not. Other partnerships in Lincoln, the commercial side of our company manages assets for Invesco.

Q Now, Lincoln, as you say, is a partnership?

A Yes.

Q And with its headquarters in Dallas, how many employees work for Lincoln Properties Partnership?

A Can you dissect the difference between commercial and residential? If you can, I can answer that. If you can't, I can't, because I don't know.

Q What is your knowledge -- what would your knowledge be in, residential?

A Purely residential.

Q What would that be?

A And I am --

MS. BERTRAM: Objection, vague. Go ahead.

THE WITNESS: Approximately 2000 employees.

* * *

[21] information?

A I'm a 30 year guy with Lincoln. And, as far as I know, we have never produced any.

Q There has never --

MS. BERTRAM: Let him finish the response.

BY MR. PHILLIPS:

Q I am sorry. Go ahead.

A We have never produced a roll up of the value of all the partners' interests in the company.

Q Now, this is not traded -- is it -- on any stock exchange?

A No.

Q And it is not a publicly offered entity since it is a partnership- Am I correct?

A Correct.

MS. BERTRAM: I need to make certain. Let him finish his question, and then you respond. It is not a regular conversation, and I want the record to be clear.

THE WITNESS: Okay.

* * *

[28] * * *

Q Besides managing some of these properties, do you also own some of them -- complexes?

A We're in partnerships. Various Lincoln partnerships are in ownership -- various Lincoln partners are partners in partnerships that own assets.

Q Okay. What percentage of the apartments that Lincoln Properties manages are also subject to partnership ownership?

A Approximately 25%.

Q Westfield Village is one of the Virginia properties?

A Yes.

Q Is that -- and you know that is owned by SWIB?

A That is correct.

Q Is there any partnership arrangement with that?

A No.

* * *

[66] They are lofty goals.

MR. PHILLIPS: Okay. And I am going to show you what I will be asking to be marked as Number Nine.

(Thereupon, Exhibit Number Nine was marked for identification.)

BY MR. PHILLIPS:

Q It is entitled Company Mission Statement. Would you look at that? Does that appear to be accurate?

A Uh-huh. (affirmative) That is correct.

Q Was that in effect -- it has been in effect for how long?

A I think this mission statement has been in effect for a couple years.

MR. PHILLIPS: Okay. I show you one other. Off the record.

(Thereupon, Exhibit Number Ten was marked for identification.)

MR. PHILLIPS: I will represent I took these off of the website also today.

(Thereupon, remarks were made off the record.)

[67] BY MR. PHILLIPS:

Q Number Ten has a list of clients in alphabetical order. Even though -- I'm telling you that I -- or I represent to you that I took this off today, February 13th. But this is not a complete list -- is it -- of all the clients?

A I can't tell you. I don't know. I mean it, in general, lists most of our clients.

Q Would Invesco be one of them that should have been listed here?

A I don't know why not. Invesco is.

Q It is?

A Uh-huh. (affirmative)

Q Which one is? Oh, yeah Invesco, Realty. It is listed. I apologize. And do you know how many more should be listed that aren't on here?

A Again, generally, that is a representation of the bulk of our clients. 70% or 75% of the buildings that we manage are owned by third parties, some of which are individual owners.

Q Okay. Now, I am going to ask you some questions about your knowledge of mold issues.

A Okay.

* * * *

APPENDIX C — EXCERPTS FROM DEPOSITION OF JOHN LeBEAU DATED MARCH 3, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (JBL)

Monday, March 3, 2003

Vienna, Virginia

CHRISTOPHE ROCHE, *et al.*,

Plaintiffs,

v.

LINCOLN PROPERTY CO., *et al.*,

Defendants.

Deposition of:

JOHN LeBEAU

a witness, called for examination by counsel on behalf of the Plaintiffs, pursuant to notice, taken in the law offices of Venable, Baetjer, Howard & Civiletti, 8002 Towers Crescent Drive, Vienna, Virginia, beginning at approximately 2:20 o'clock p.m., before William L. Finley, Verbatim Reporter and Notary Public in and for the Commonwealth of Virginia, when there were present on behalf of the respective parties:

* * *

[20] A Vice President.

Q Is there anyone higher ranking than you at this regional office, as far as supervisory or management authority?

MS. BERTRAM: Objection; vague.

BY MR. PHILLIPS:

Q In other words, who is the highest ranking officer at that office?

MS. BERTRAM: Same objection.

BY MR. PHILLIPS:

Q Today, I mean. Right now.

A Jeff Franzen.

Q Jeff --

A Franzen.

Q And does he work out of the Herndon office?

A Yes.

Q And how long has he been there?

A I don't know.

Appendix C

Q Has he been there since you started in 1999?

A Yes.

Q And that's F-r-a-n-z-e-n?

[21] A Yes.

Q And what's his title?

A Senior Vice President, Partner.

Q He is a partner in Lincoln Property Company; correct?

MS. BERTRAM: Objection to the extent it calls for speculation.

BY MR. PHILLIPS:

Q Is that correct?

A I don't know what he is a partner of.

Q Well, you report to him?

A Somewhat.

Q Who is your direct report?

A Fred Cheney.

* * * *

APPENDIX D — PART OF LINCOLN PROPERTY COMPANY'S INTERNET WEBSITE DATED FEBRUARY 13, 2003

Reggae D. Delponte, Senior Vice President - California

Reg DelPonte is Senior Vice President and Operating Partner for Lincoln Property Company - California. Mr. DelPonte opened the Western Region office in September 1998. His responsibilities include all residential development in California as well as acquisition of existing properties or portfolios. Since opening the office, he has developed over 2,000 multifamily units and acquired a portfolio of 3,500 existing units.

Prior to joining Lincoln, Mr. DelPonte was President of Calco Investments and in 1983 formed DelPonte Companies, which developed mixed use commercial and industrial business parks with a total of 2.5 million square feet of development. Mr. DelPonte began his real estate career as a commercial real estate broker with Grubb & Ellis Commercial Brokerage Company in 1979 where he received numerous awards, including Overall Top Producer for two consecutive years.

Mr. DelPonte is a native of Denver and a member of the Urban Land Institute.

Appendix D

Jeff B. Franzen, Senior Vice President - Mid Atlantic

Jeff Franzen is Senior Vice President and Operating Partner for Lincoln Property Company Northeast/MidAtlantic. Mr. Franzen opened the Washington DC office for Lincoln in 1985 and directs all of Lincoln's residential operations from New England to North Carolina. His region currently manages over 12,500 apartment units.

Mr. Franzen currently serves on the Boards of the National Multi-Housing Council the Women's Center of Northern Virginia and is active in the Urban Land Institute serving as Vice Chairman of the Program Council. A native of Dallas. Mr. Franzen received a BBA from Southern Methodist University in 1976 and an MBA from the University of Dallas in 1979. Mr. Franzen is licensed as a real estate broker in most of the eastern United States and is an active CCIM candidate.

Kevin Keane, Senior Vice President - Eastern Midwest

As Senior Vice President and Operating Partner for the Lincoln Property Company Midwest. Mr. Keane is responsible for overseeing development, financing and monitoring ongoing property management activities throughout Pennsylvania. Ohio, Michigan, West Virginia mid Kentucky. Mr. Keane also tracks market conditions, which affect cities throughout the Midwest markets. He then determines which markets and sub-markets in which to concentrate real estate development and value added real estate investments. Mr. Keane is also involved in the financing, sale, development, construction and management of . . .

* * * *

APPENDIX E — SIGNATURE PAGE OF LINCOLN'S ANSWERS TO INTERROGATORIES DATED DECEMBER 2, 2002

In addition to its General Objections, Defendant objects to this Interrogatory on the grounds that it purports to impose requirements different from or in addition to the Federal Rules of Civil Procedure and the Rules of the United States District Court for the Eastern District of Virginia. Subject to and without waiving its General and Specific Objections, Defendant will produce the expert disclosures required by the Federal Rules and the Local Rules pursuant to and within the time frames established by those rules.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 15:

Subject to and without waiving its General and Specific Objections, see Defendants' expert disclosures pursuant to Rule 26(a)(2).

AFFIRMATION

I, Jeff B. Franzen, hereby certify and affirm, under the pains and penalties of perjury, that I am the Senior Vice President/Partner for Defendant Lincoln Property Co. ("Lincoln"), that I am authorized to act for Lincoln, that the facts set forth in these Supplemental Answers to Plaintiff Christophe Roche's First Set of Interrogatories have been assembled at my direction, with the assistance of authorized employees and counsel for Lincoln, and that the assertions therein are true and correct to the best of my knowledge, information and belief. Lincoln reserves the right to supplement its responses to the extent that subsequent

discovery should reveal any additional facts not currently known to Lincoln. Executed this 19th day of February 2003.

s/ Jeff B. Franzen
Jeff B. Franzen
Senior Vice President/Partner

APPENDIX F — EXCERPTS FROM LINCOLN'S FRCP 26(a)(1)(A) INITIAL DISCLOSURES DATED DECEMBER 2, 2002

Lincoln expressly reserves all objections to the use and admissibility of any of the categories of documents identified in these Initial Disclosures. Moreover, Lincoln reserves any objections it may have to the production of these categories of documents under the Federal Rules of Civil Procedure, the Federal Rules of Evidence, or any privileges or protections that may be available under federal or state statutory or common law.

I. 26(a)(1)(A):

In compliance with Rule 26(a)(1)(A), Lincoln lists below the names, addresses, and telephone numbers of individuals who are likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings:

Name	Address	Topics
John LeBeau Vice President Lincoln Property Co.	Contact through counsel for Lincoln only.	Leases between the Roches and SWIB Roches' service requests Lincoln's response to service requests alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village remediation of the Roches' apartment handling and storage of the Roches' personal property

Appendix F

Name	Address	Topics
Jeff B. Franzen Senior Vice President/ Partner	Contact through counsel for Lincoln only.	Alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village remediation of the Roches' apartment handling and storage of the Roches' personal property.
Lana Zylka (Former) Regional Manager Lincoln Property Co.	Contact through counsel for Lincoln only.	Lease between the Roches and SWB Roches' service requests Lincoln's response to service requests alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village remediation of the Roches' apartment

APPENDIX G— LINCOLN'S STIPULATION LETTER REGARDING FINANCIAL STATISTICS FOR SATISFACTION OF PUNITIVE DAMAGES DATED MARCH 18, 2003

VENABLE

Attorneys at Law

March 18, 2003

VIA FACSIMILE AND REGULAR MAIL

Jerry M. Phillips

Phillips, Hall, Beckwith & Chase

10513 Judicial Drive, Suite 100

Fairfax, VA 22030

Re: *Christophe Roche, et al. v. Lincoln Property Co., et al.*, United States District Court for the Eastern District of Virginia, Civil Action No. 02-1390-A (JBL)

Dear Jerry:

I am writing in response to your March 13, 2003 letter requesting information concerning Lincoln's financial statements. Lincoln is willing to enter into a stipulation regarding the following financial information concerning EQR/Lincoln Limited Partnership, the entity that receives the management fees for Westfield Village Apartments:

	2001 (audited)	2002 (unaudited)
Net worth/book value	$7,759,939	$8,655,790
Revenue from Management Fees	$19,884,710	$17,353,301
Other Revenue	$17 258,929	$ 7,535.277
Total Revenue	$37,143,639	$24,888,578

Appendix G

I believe that this proposed stipulation addresses each of the categories of information requested in your March 13, 2003 letter. If this proposal is acceptable, I will amend the parties' proposed pre-trial stipulations to include this information.

Thank you for your assistance with this matter.

Sincerely,

s/ Connie N. Bertram /nsc
Connie N. Bertram

APPENDIX H — LAST HALF OF SIGNATURE PAGE OF ROCHES AND LANDLORD LEASE DATED MARCH 30, 2001

made by Owner or its representatives to one of the Residents of the Apartment shall be binding on all Residents of the Apartment with the same force and effect as if made to each of them. All obligations hereunder are to be performed in the county where the community is located. If Owner is unable to give resident possession of the Apartment at the agreed date for any reason, including construction, holdover, etc., Owner shall not be in default hereunder nor be liable to resident as a result of such delay, and the Lease shall remain in force subject to the following: (1) Rent shall be abated on a daily basis during such delay, and (2) Resident may terminate by giving written notice to Owner upon at least five (5) days written notice to Owner, whereupon Resident shall be entitled only to a refund of the Security Deposit and prepaid rent. Resident's right of abatement or termination shall not apply to cleaning or repair delays which do not prevent occupancy by Resident. All of Resident's statements in the rental application were relied upon by Owner in execution of the Lease. Resident may not withhold Rent or offset against Rent. In the event the Lease is executed prior to approval of Resident's rental application by Owner, the Lease shall not become effective until Owner has either tendered the Apartment to Resident or approved resident's application(s) in writing. Any clause of the Lease declared invalid by law shall not invalidate the remaining clauses in the Lease. It is specifically understood and agreed between the parties hereto that any obligation of Owner to pay money or other consideration to Resident shall be satisfied solely from the Owner's estate and interest in the property of which the Apartment is a part, or the proceeds thereof, and Resident covenants and agrees that only such financial interest will be pursued for the satisfaction of any remedy which Resident

may have for the collection of money or other consideration from Owner by judicial press or otherwise.

11. LINCOLN PROPERTY COMPANY'S STATUS. Important: Read this Section carefully. It is specifically understood and agreed that LPC acts only as Agent for Owner. Responsibility for all obligations of Owner, including Security Deposits, rests entirely on such Owner. Resident agrees that LPC may exercise and shall have all of the rights, powers and benefits of Owner hereunder.

12. THIS CONTRACT may be executed in multiple copies. Omission of initials on any page of this Lease does not invalidate the Lease. A copy of Owner's Community policies will be furnished when Resident moves in, or earlier if requested.

13. SPECIAL PROVISIONS OR ADDITIONAL AGREEMENTS: In the event of an emergency, death, or illness involving Resident. Resident hereby authorizes Owner or its representatives to give Resident's key and release of all resident's possessions to the representative designated on page one of this Lease subject to Owner being directed otherwise by a Probate or other court of law. During the Lease Term or during any renewal or extension thereof, upon thirty (30) days' written notice to Resident.

14. Owner may increase the Rent. If Owner reasonably determines that the expenses fairly allocable to the Apartment for capital improvements to the Community,

property taxes, utilities, charges for municipal services, insurance, or operating and maintenance expenses have increased by at least the amount of the rental increase, but in no event shall such increase exceed fifteen percent (15%) during the Lease Term. Owner reserves the right to increase Rent for reasons other than specified herein above upon forty-five (45) days' written notice to Resident, in which event Resident shall have an opinion to terminate the Lease by giving Owner written notice of termination within seven (7) days after receipt by the Resident of the aforesaid notice of Rent increase. In the event of termination by Resident, such termination shall be effective on the date of the scheduled Rent increase. Other provisions, if any, shall be set forth on page one of this Lease.

15. HAZARDOUS SUBSTANCE. Residents shall use no hazardous substance or hazardous materials in or around the apartment except for normal household cleaning products which will be used and stored in a manner consistent with such household use, and Residents shall dispose of such cleaning products in accordance with all applicable laws.

36. THIS IS A BINDING LEGAL DOCUMENT. READ ENTIRE CONTRACT. WHICH CONSISTS OF PARAGRAPHS 1-34. EXHIBITS "A" and "B", AND ANY ADDENDA ATTACKED HERETO. CAREFULLY BEFORE SIGNING BELOW AND INITIALING ALL PAGES ATTACHED HERETO.

Appendix H

Resident(s)	Date	OWNER: s/ SWIB
s/ [illegible]	03-30-01	
s/ [illegible]	03-30-01	

By: LINCOLN PROPERTY COMPANY ECW, INC. AGENT
3500 Lincoln Plaza
500 North Akard
Dallas, Texas 75201-3394

By: s/ Matthew Lewis
(Lincoln Property Company Agent)

(6)

Supreme Court, U.S.
FILED
MAY 17 2005
OFFICE OF THE CLERK

No. 04-712

IN THE
Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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May 16, 2005

QUESTIONS PRESENTED

1. Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b).

2. Whether a limited partnership's citizenship for diversity subject-matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Lincoln Property Company and State of Wisconsin Investment Board state the following:

Lincoln Property Company is a privately held company. Lincoln Property Company has no parent company, and no publicly held company owns 10% or more of its stock.

The State of Wisconsin Investment Board ("SWIB"), incorrectly sued below as SWIB Investment Company, is an independent agency of the State of Wisconsin and, as such, has no parent companies, subsidiaries, or affiliates for which disclosure is required.

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INTRODUCTION

This case involves critical rules for determining whether defendants have diverse citizenship and thus may remove a case brought against them to federal court. The Fourth Circuit struck a double blow against legal clarity and sound judicial administration. First, it held that a court's duty is to look *outside* the complaint to determine whether some putative defendant that plaintiffs had *not* named in the complaint or joined as a party defendant could nonetheless destroy the complete diversity that exists between the plaintiffs and the named defendants. If such a non-named putative defendant exists, the court held, then the defendants fail to carry their burden of showing that removal was proper. Second, the court opined that, if the non-named entity is a limited partnership, it is not enough that the citizenship of each partner be actually diverse to the citizenship of each plaintiff. Rather, the partnership must demonstrate that it lacks a "very close nexus" with the state of plaintiff's citizenship.

Both rules depart from longstanding principles adopted by this Court. The Fourth Circuit's first holding conflicts with the plain language of the removal statute, which permits removal where each of the "parties in interest *properly joined and served* as defendants" is diverse to each plaintiff. 28 U.S.C. § 1441(b) (emphasis added). It also departs from a series of cases decided by this Court that set forth clear jurisdictional rules by which plaintiffs are held to the choices they make in framing the parties and jurisdictional facts alleged in the complaint. The Fourth Circuit's second holding is equally erroneous, because it replaces a bright-line rule of jurisdiction established by this Court in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) – that the citizenship of a limited partnership is based on the citizenship of each partner – with a "nexus" test made up out of whole cloth that is virtually impossible to administer in a fair and consistent manner. This Court should reject both holdings and reverse the Fourth Circuit's judgment.

OPINIONS BELOW

The opinions of the district court granting petitioners' motion for summary judgment and denying respondents' motion for summary judgment (Pet. App. 22a-40a), and denying respondents' motion to remand (*id.* at 84a-93a), are unreported. The district court's opinion granting petitioners' motion to exclude the testimony of respondents' medical expert (*id.* at 42a-79a) is reported at 278 F. Supp. 2d 744. The court of appeals' opinion (Pet. App. 1a-19a) is reported at 373 F.3d 610.

JURISDICTION

The court of appeals entered its judgment on June 30, 2004. A petition for rehearing was denied on July 27, 2004. Pet. App. 97a. On October 18, 2004, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 24, 2004, *id.* at 98a, and the petition was filed on that date. The petition for a writ of certiorari was granted on February 28, 2005. 125 S. Ct. 1398. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The provisions of 28 U.S.C. §§ 1332, 1441, and 1447, and Federal Rules of Civil Procedure 17 and 19, are set forth in the addendum to this brief.

STATEMENT

1. Petitioner State of Wisconsin Investment Board ("SWIB") is the owner of Westfield Village Apartments, located in Centreville, Virginia. *See* JA 89, 94. Respondents Christophe Roche and Juanita Roche entered into a lease with SWIB dated March 30, 2001, for Unit 104 at Westfield Village. *See* JA 89-100. The first sentence of that lease states that the parties to the lease "are the owner of the Apartment . . . , acting by and through its authorized agent, Lincoln Property Company (LPC) and the residents." JA 90. Lincoln Property Co., petitioner here, will be referred to as "Lincoln." The lease was

executed on behalf of SWIB by "Lincoln Property Company ECW, Inc. Agent." JA 94.

On August 22, 2002, respondents filed nearly identical complaints in a Virginia state court (each styled a "Motion for Judgment" pursuant to Virginia practice). Each complaint asserted the same 11 state-law tort and contract claims (plus a twelfth claim in Mr. Roche's complaint based on his employment relationship with Lincoln), which alleged the presence of "toxic mold that adversely affected the personal property and health of the Roche family." JA 29, 55.[1] The complaints named SWIB, a party to the lease and the owner of Westfield Village, as a defendant. The complaints also named as a defendant the SWIB agent denominated in the lease, Lincoln Property Company, as follows: "Lincoln Property Company t/a Lincoln Property Company ECW, Inc." JA 26, 52.[2]

Respondents alleged that Mr. Roche "was employed by Lincoln in December of 2001" and that he was unlawfully terminated because he had raised the issue of the presence of mold in his apartment. JA 36-37, 62-63. They also asserted that Lincoln and SWIB were responsible, not only for their own acts, but also for those of their

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[1] Mr. Roche's complaint alleged the following claims: Count I, Negligence – *Per Se*; Count II, Breach of Lease; Count III, Breach of Implied Warranties; Count IV, Breach of Contract; Count V, Actual Fraud/Intentional Misrepresentation; Count VI, Constructive Fraud/Negligent Misrepresentation; Count VII, Consumer Fraud/Trebling of Damages (Violation of Virginia Consumer Protection Act); Count VIII, False Advertising (Violation of Virginia Code Section 18.2-216); Count IX, Tortuous [*sic*] Interference With Contract by Improper Methods; Count X, Conversion; Count XI, Intentional Infliction of Emotional Distress; Count XII, Negligent Infliction of Emotional Distress. *See* JA 38-50. Mrs. Roche's complaint alleged the same claims except for Count IX. *See* JA 64-75.

[2] The complaints also named a third defendant, INVESCO Institutional, an entity dismissed from this suit by the district court on November 27, 2002. *See* JA 112, 113. Plaintiffs never challenged that dismissal, and they chose not to name INVESCO as a defendant in either of their two subsequent amended complaints.

agents, alleging that "[a]ll the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment." JA 30, 56. The complaints also alleged the following with respect to the activities of Lincoln (JA 27, 53):

> 3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. (Henceforth, Lincoln Property Company will be referred to as ("Lincoln")).
>
> 4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.
>
> 5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

2. Defendants SWIB and Lincoln, petitioners here, removed the cases to the United States District Court for the Eastern District of Virginia based on diversity jurisdiction and consolidated them into a single proceeding.

See JA 76-83. The complaints identified the plaintiffs as citizens and domiciliaries of Virginia. *See* JA 27, 53.

Petitioners' notices of removal stated that "Lincoln is a Texas corporation with its principal place of business in Texas," and "SWIB is an independent agency of the state of Wisconsin and, thus, a Wisconsin citizen." JA 77, 81. At the time of removal, respondents did not object to removal, seek to have the case remanded to state court, or attempt to join any additional defendants to the suit. Nor did they seek to join any additional defendants subsequently, despite having stated in their complaints that they would, "[u]pon further discovery," "determine if additional defendant or defendants will be named." JA 28, 54.

Following their removal of the case to federal court, petitioners moved under Federal Rules of Civil Procedure 8(a)(2), 9(b), and 12(b)(6) to dismiss the complaints. The district court substantially granted that motion and dismissed all but one of their claims, but gave respondents leave to amend. *See* JA 101-13. On December 16, 2002, respondents filed a second amended complaint against petitioners alleging only four claims.[3] Because the district court had held that the original complaints violated Rule 8(a)(2) by denying petitioners fair notice of which claims were alleged against which defendant, the second amended complaint specified which claims were alleged against which defendant, as follows: Count I, Negligence ~ *Per se* (Lincoln and SWIB); Count III, Breach of Implied Warranties (SWIB only); and Count IV, Conversion (Lincoln only). *See* JA 128-31, 133-34. Subsequently, respondents voluntarily dismissed their Count II claim for breach of lease alleged against SWIB only, pursuant to Federal Rule of Civil Procedure 41(a)(2). *See* JA 182.

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[3] Respondents had sought to file an amended complaint after petitioners filed their motion to dismiss, but before the district court had ruled on it. The court declined to accept the first amendment because it was drafted without the benefit of its ruling. *See* JA 113.

The second amended complaint, like the original complaints, rested in part on an agency theory. It alleged that "SWIB as owner of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment." JA 118; *see also* JA 115 ("The Defendant Lincoln acted as the agent for SWIB in maintaining the plaintiffs' apartment."); JA 125 ("Under the theory of *respondeat superior*, 'SWIB', as the principal, is accountable for all of the wrongdoings and breaches by its agent, Lincoln.").

Following the close of discovery, petitioners filed a motion for summary judgment on all three claims alleged in the second amended complaint. Petitioners also filed a motion under this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), seeking to bar the testimony of Dr. Richard Bernstein, respondents' only medical causation expert. On April 16, 2003, the district court entered an order notifying the parties that it had granted petitioners' motions in their entirety and that the court would be issuing a Memorandum Order and Judgment setting forth the reasons for its decision in the near future. *See* Pet. App. 20a-21a. On July 25, 2003, the district court issued two memorandum orders granting petitioners' motions for summary judgment and excluding Dr. Bernstein's testimony. *See id.* at 22a-41a, 42a-81a. None of those rulings on the merits is before this Court.

3. On April 22, 2003, six days after the court gave notice that it had granted summary judgment in favor of petitioners, respondents filed a motion seeking to remand the case to state court, asserting that the court lacked diversity jurisdiction because Lincoln was a citizen of Virginia. Respondents argued, based primarily on misconstrued deposition testimony of Lincoln representatives, that "defendant Lincoln Property Co., is not a Texas Corporation, but a Partnership with one of its partners

residing in the Commonwealth of Virginia." JA 226.[4] Respondents claimed that the partnership they had sued was EQR/Lincoln Limited Partnership ("EQR"), an entity affiliated with Lincoln that collected the fees for managing Westfield Village from SWIB. *See* JA 228-30. Nevertheless, even at the post-judgment stage, respondents sought neither to name EQR as a defendant nor to join it as an indispensable party.

In response to respondents' motion, petitioner Lincoln submitted a declaration from Lincoln's General Counsel Dan Jacks affirming that Lincoln, the entity sued by respondents, was a Texas corporation with its principal place of business in Texas. *See* JA 238. Lincoln attached to the Jacks declaration its articles of incorporation, which established that Lincoln is a corporation, not a partnership. *See* JA 241-46. That evidence thus conclusively established that Lincoln – the only Lincoln entity that had been "properly joined and served" under § 1441 and therefore the only relevant Lincoln entity for purposes of assessing diversity jurisdiction – was in fact diverse.

Moreover, to clarify why respondents' argument concerning EQR was unfounded – even assuming the relevance of a non-named defendant for determining diversity – Lincoln also submitted evidence establishing that EQR was completely diverse from respondents because none of EQR's partners – general or limited – was a citizen of Virginia. *See* JA 247-70. The Jacks declaration demonstrated that the general partner of EQR was Lincoln Eastern Management Corporation ("LEMC"), a Texas corporation with its principal place of business in Dallas, Texas, and its limited partner was Lincoln Placeholder Limited

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[4] Respondents relied primarily on the deposition testimony of Fred Chaney and John LeBeau. Based on respondents' misunderstanding of Chaney's and LeBeau's testimony regarding Lincoln's corporate structure, respondents asserted the theory that the Lincoln entity they had sued was not a Texas corporation, but rather a partnership with one partner who was a Virginia resident. *See* JA 230-32.

Partnership ("LPLP"). *See* JA 239. The Jacks declaration further detailed the citizenship of those entities by attaching partnership and corporate documents establishing that LPLP's general partner was LEMC and its limited partner was Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Dallas, Texas. *See id.*[5] Respondents did not challenge that evidence or the briefing on that issue, but claimed only that EQR had its "principal place of business" in Virginia. *See* Plaintiffs' Motion for Leave To File Supplemental Brief at 3 (filed June 13, 2003). *See infra* pp. 41-44.[6]

On August 11, 2003, the district court entered an order denying respondents' motion to remand and for relief from judgment. *See* Pet. App. 84a-93a. The court held that it had diversity jurisdiction because Lincoln, the entity named in respondents' complaints, was a Texas corporation:

> [T]he entity Plaintiffs identified in their Motion for Judgment filed in state court is Lincoln Property Company, located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas, 72501. This corporation is a Texas corporation with its principal place of business in Texas. (Dan M. Jacks Decl., Ex. 1(A)-(E).) Therefore, the entity that Plaintiffs sued is a Texas corporation.

Id. at 86a-87a.

The district court also rejected respondents' assertions with respect to EQR. While maintaining that the citizenship of EQR was irrelevant because respondents had never sought to name it as a defendant, the court held

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[5] A chart setting forth the relevant Lincoln entities in diagrammatic form is reproduced at Pet. App. 96a.

[6] Respondents subsequently added a new argument to their motion to remand, asserting that the court also lacked jurisdiction over SWIB because it allegedly was an "arm" of the State of Wisconsin. JA 290. The district court denied that claim, *see* Pet. App. 88a-92a, and respondents declined to ask this Court to review that decision.

that, "even if EQR is the proper defendant in this case (although Plaintiffs did not sue this entity), EQR is not a citizen of Virginia." *Id.* at 87a. Based on the unrebutted evidence submitted by Lincoln concerning the citizenship of EQR, the district court held that

> EQR is a partnership registered and operating under the laws of Delaware. Furthermore, EQR's partners are: (1) Lincoln Eastern Management Corporation, which is incorporated in Texas and maintains its principal place of business in Texas, and (2) Lincoln Placeholder Limited Partnership, which is a Texas partnership. In addition, Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Texas. Therefore, EQR is a citizen of Texas and no other state; and, even assuming that EQR is the proper defendant, EQR's citizenship is diverse from [respondents].

Id. at 87a-88a (citations omitted).

4. Respondents appealed. In their arguments to the Fourth Circuit, they did not challenge the district court's ruling that Lincoln – the entity they sued – was diverse. Nor did they challenge the district court's holding that EQR – an entity they declined to sue – was also diverse. Accordingly, in their briefs to the court of appeals, none of the parties presented arguments or cited evidence concerning the citizenship of Lincoln or any of its affiliates such as EQR.

Instead, respondents appealed the district court's orders on three main grounds. *First*, they challenged the entry of summary judgment on only two of the three claims in the second amended complaint – the implied warranty of habitability claim alleged only against SWIB, and the conversion claim alleged only against Lincoln. Respondents did not, however, challenge the entry of summary judgment on the second amended complaint's

negligence claim alleged against both Lincoln and SWIB.[7] Nor did they challenge the district court's Rule 12(b)(6) dismissal of *any* of the claims from their original state-court complaints. *Second*, respondents challenged the court's *Daubert* holding that their medical causation expert's testimony was unreliable and therefore inadmissible. *Third*, respondents appealed the district court's holding that SWIB was not the alter ego of the State of Wisconsin and was therefore diverse to the plaintiffs for purposes of diversity jurisdiction.

The Fourth Circuit addressed none of these fully briefed issues in its decision. Instead, on June 30, 2004, the court of appeals entered a *sua sponte* ruling that petitioner Lincoln had not established diversity jurisdiction with respect to "some Lincoln entity related to this action." Pet. App. 11a. That issue had not been raised by respondents in their appeal. The court perceived its duty to be to ascertain what it characterized as the "real party in interest" on the defendants' side of the case, notwithstanding that respondents had not sued or joined any other Lincoln-affiliated defendant. *Id.* at 9a-10a. It then identified the supposed "real party in interest," which it thought was EQR because that entity "receives the management fees for Westfield Village Apartments." *Id.* at 11a-12a (internal quotation marks omitted).

Having identified EQR as the "real" interested (yet non-named) defendant, the court of appeals then assumed that Lincoln had failed to disclose all of EQR's limited partners because a Lincoln deponent, John LeBeau, had identified an individual named Jeff Franzen, a Virginia citizen and Lincoln Senior Vice President, as a "partner" of an unspecified partnership affiliated with Lincoln. *See*

[7] While respondents mentioned in passing that their complaint had "included a Count for negligence *per se*," Brief of Appellants at 24, they did not present any argument for reversing dismissal of that claim and did not identify it in their statement of the issues presented to the court of appeals, *see id.* at 1-2.

id. at 11a.[8] The court then discounted an affidavit by Mr. Franzen averring that he was not a partner in EQR. The court opined that Mr. Franzen "never identifies those other limited partnerships, nor is there any evidence as to how they are distinct or uninvolved in Lincoln's Virginia business enterprises and many Virginia property holdings, nor does Franzen identify any of his partners." *Id.* Left with what it perceived to be an evidentiary gap, the court held that Lincoln had failed to meet "its burden of establishing diversity," *id.* at 13a, because it had failed to show "that one member of the Lincoln group of companies doing business in Virginia is not a citizen of the Commonwealth," *id.* at 17a. It also viewed the evidence as suggesting that EQR was not diverse because it had a "very close nexus" with Virginia. *Id.* at 16a. Rather than remand for fact-finding in the district court on the issue of EQR's "nexus" with Virginia – which the court of appeals had raised *sua sponte* without giving the parties an opportunity for briefing – the Fourth Circuit ordered this case to be remanded to state court. *See id.* at 18a-19a.

5. Upon remand to the district court, Lincoln unsuccessfully moved for relief from the mandate or for the presentation of new evidence in order to fill the evidentiary gaps perceived by the court of appeals. First, the evidence proffered by Lincoln showed that, even if the Fourth Circuit's novel "very close nexus" test were applicable, EQR's nexus with Virginia was far from being "very close." At the time the plaintiffs filed their complaints in state court on August 26, 2002, EQR fee-managed 281

[8] Although Mr. LeBeau was not designated as a 30(b)(6) witness on any topic, the court stated that Mr. LeBeau was "Lincoln's 30(b)(6) deponent," Pet. App. 11a, and quoted his testimony as that of a 30(b)(6) deponent, *see id.* at 11a & n.10 (citing C.A. App. 1606, reproduced at JA 274). The court also quoted the testimony of Mr. Chaney as that of a 30(b)(6) deponent. *See id.* at 11a; *see also id.* at 8a. While Mr. Chaney was designated as a 30(b)(6) witness on certain limited topics (*i.e.*, Lincoln's mold policies and its relationship with SWIB), respondents did not notice him (or any other witness) as a corporate spokesman regarding Lincoln's corporate structure or affiliated partnerships.

projects, including 79,487 apartment units, in 17 states; only 15, or 5%, of those projects were located in Virginia, and those Virginia projects accounted for only 14% of EQR's total revenues for fee-management services in 2002. *See* Declaration of Dan M. Jacks (Aug. 5, 2004). In addition, EQR's headquarters and principal place of business were in Dallas, Texas. *See id.* Second, in response to the Fourth Circuit's criticism that Lincoln had failed to prove the negative that Jeff Franzen was *not* a partner in EQR, *see* Pet. App. 11a, 13a, Lincoln submitted evidence setting out all the partnerships in which he was a partner, none of which includes EQR. *See* Declaration of Jeff Franzen (Aug. 5, 2004).[9]

SUMMARY OF ARGUMENT

I. Neither congressional statute nor this Court's precedents sanction the court of appeals' wide-ranging, *sua sponte* inquiry into the citizenship of entities *not* named in the plaintiff's complaint in determining whether diversity jurisdiction exists. Plaintiffs, as masters of their complaint, may sue or decline to sue any entity that potentially may be liable to them. As the district court correctly understood, the diversity-jurisdiction inquiry focuses only on the defendants actually named to the suit – not on putative defendants that plaintiffs might have named but chose not to name. That rule is consistent with the decisions of this Court in closely analogous

[9] Both of the two-page declarations cited in this paragraph were attached to Lincoln Property Co.'s Memorandum in Support of Motion for Relief From Mandate and, in the Alternative, To Present New Evidence (filed Aug. 5, 2004), which is docketed as entry number 186 on the district court's docket sheet. *See* JA 18. Petitioners did not include this document in the joint appendix because respondents objected that, since it was submitted to the district court after the Fourth Circuit's remand, it is not properly part of the official record now before the Court. Lincoln disagrees with that characterization and believes that it is part of the official record because it was docketed in the district court and the complete record in the district court is to be transmitted to this Court. In any case, Lincoln stands ready to lodge these declarations with the Court promptly upon request.

circumstances, which permit plaintiffs to dismiss a non-diverse, named defendant in order to create diversity where none existed when the complaint was filed. If plaintiffs are permitted voluntarily to dismiss a *named* defendant, then it would be odd to hold that the existence of a *non-named* entity having some interest in the lawsuit could destroy diversity. This Court's precedents make clear that, while plaintiffs are masters of their complaint, they must be held to the choices they make in deciding what to allege and whom to sue.

The Fourth Circuit's approach would lead to massive uncertainty and increased litigation. Plaintiffs who lose on the merits in the district court would be free, post-judgment, to cast about for jurisdictional spoilers that they declined to sue, whether through clever strategem or dilatoriness. A substantial amount of federal-court litigation in diversity cases would thus become a mere dress rehearsal for plaintiffs' re-litigation of the merits in state court. Defendants would have little assurance that a district court's final judgment would survive a jurisdictional challenge based on the existence of an interested, non-diverse person or entity that plaintiffs never named as a defendant.

II. Even if it were proper for the court of appeals to have considered the citizenship of non-named EQR at all – and it was wholly improper – diversity jurisdiction still would exist because EQR, a limited partnership whose partners were all citizens of Texas at the time the complaints were filed and the case was removed, was completely diverse to the Virginia respondents-plaintiffs. The Fourth Circuit simply took this Court's controlling rule – that the citizenship of a limited partnership is based only on the citizenship of all its partners – and engrafted upon it a made-up "very close nexus" test that, similar to its first misguided holding, requires a far-reaching, indeterminate, and unpredictable inquiry into the "nexus" that a non-named defendant has with the plaintiffs' state of citizenship. That novel addition to this Court's controlling

rule finds no support in law. Indeed, nearly 40 years ago, this Court squarely *rejected* an analogous request to hold that an unincorporated association is a citizen of its principal place of business, and Congress has not acted on subsequent proposals to do so. The Fourth Circuit, in a *sua sponte* and errant decision, has thus functionally done what this Court and Congress have declined to do. That holding therefore also should be reversed.

ARGUMENT

I. THE CITIZENSHIP OF A LINCOLN AFFILIATE THAT PLAINTIFFS DID NOT SUE IS IRRELEVANT TO DIVERSITY JURISDICTION

A. Removal Is Proper Because Complete Diversity Exists In This Case

The federal diversity jurisdiction statute provides, in pertinent part, that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a). This Court has construed a predecessor to this present diversity jurisdiction statute to require "complete" diversity, such that all plaintiffs must be diverse from all defendants. *See, e.g., Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

The removal statute, in turn, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States." 28 U.S.C. § 1441(a). Section 1441(b) provides that diversity cases "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

The statutory requisites were readily satisfied here. There was complete diversity because defendants and plaintiffs were "citizens of different States" (§ 1332(a)), thus giving the district court "original jurisdiction" (§ 1441(a)); SWIB and Lincoln were "parties in interest

properly joined and served as defendants" (§ 1441(b)); and neither defendant was a "citizen of the State in which such action is brought" (*id.*). SWIB was a citizen of Wisconsin because it was an independent agency of the State of Wisconsin. *See* JA 77, 81. Lincoln was a Texas corporation with its principal place of business in Dallas, Texas, and was therefore a citizen of Texas. *See id.*; *see also* 28 U.S.C. § 1332(c)(1) ("For the purposes of this section and section 1441 of this title . . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business").[10] Respondents-plaintiffs, on the other hand, were both citizens of Virginia. *See* JA 27, 53, 114. Accordingly, there was complete diversity between all parties named by plaintiffs to the suit, and no defendant was a citizen of Virginia, the state in which the action was brought.[11]

It does not matter that there might have been other putative defendants that plaintiffs chose not to sue. Indeed, even if it were the case that plaintiffs' claims had little or no chance of success on the merits against the defendants they did sue, that would not give them – or the court below – post-judgment leave to cast about for other potential defendants under the guise of identifying a jurisdictional flaw. In any case, there is no reason to think respondents failed to bring any claims on which both SWIB and Lincoln faced potential liability on all 12 counts. The original complaints, as well as the second amended complaint, alleged that SWIB owned Westfield Village and was a party to the lease. *See* JA 28, 54, 115.

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[10] Respondents never claimed that Lincoln's principal place of business was in Virginia (rather than in Texas) and, in fact, submitted evidence from the Virginia State Corporation Commission that Lincoln is neither incorporated nor registered to do business in Virginia. *See* JA 234-35.

[11] There is no dispute that the amount-in-controversy requirement is satisfied, for the state complaints and the second amended complaint sought $10 million in damages.

Respondents alleged all 12 of their original claims, and three of their four second amended complaint claims, against SWIB.

Respondents also apparently alleged all 12 of their original claims,[12] and two of the claims in their second amended complaint, against Lincoln. Respondents' theory was that Lincoln was responsible for its own acts, those of its agents, and those it committed as the agent of SWIB. *See* JA 30, 56 ("All the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment"). The theory of respondents' suit was thus that Lincoln was responsible for managing the Westfield complex. *See also supra* pp. 2-4.[13] The complaints also alleged that "Mr. Roche was employed by Lincoln in December of 2001" and suffered adverse employment action. JA 36-37, 62-63, 124-25.[14] Accordingly, based on respondents' allegations, Lincoln faced potential liability either (1) for its own acts; (2) as the agent of SWIB; (3) as a joint tortfeasor with SWIB or another

[12] Or so it arguably appeared until the district court ordered respondents under Rule 8(a)(2) to amend their claims to give each petitioner fair notice of which claims were being alleged against which petitioner. *See* JA 103 ("Where the complaint names several defendants, the complaint must allege, with precision, the wrongful conduct charged to a particular defendant and cannot plead all of its claims against all defendants collectively.").

[13] Lincoln and SWIB admitted the allegation that "[t]he Defendant Lincoln acted as the agent for SWIB in maintaining the plaintiffs' apartment." JA 115; *see* JA 138, 151 (answering second amended complaint ¶ 7(b)).

[14] Lincoln and SWIB admitted the allegation that "Mr. Roche was employed by Lincoln in December of 2001." JA 124; *see* JA 142, 155 (answering second amended complaint ¶ 41).

Lincoln affiliate; or (4) for the acts of its own agents, which could arguably include EQR.[15]

Accordingly, examination of citizenship of the defendants named in the complaint should have been the end of the Fourth Circuit's *sua sponte* inquiry into whether diversity jurisdiction is present in this case between Lincoln and respondents. Based on the plain language of § 1441, the court of appeals should have affirmed the district court's ruling that the case was properly removed. The court had no statutory basis for examining the citizenship of entities that had *not* been "properly joined and served as defendants" in deciding whether removal under § 1441(b) was proper.

B. This Court's Cases Announcing Rules In Diversity Cases Further Support Removal In The Circumstances Presented Here

Over the past two centuries, this Court has announced a range of decisions addressing diversity jurisdiction that amply support removal of respondents' complaints and demonstrate that the court's analysis should focus only on the named defendants. The following principles confirm the propriety of removal in this case: (1) as masters of their complaint, plaintiffs' choice of whom to sue is respected when they choose to sue only diverse parties; and (2) even if plaintiffs sue a non-diverse defendant, they are permitted voluntarily to dismiss that party to create diversity jurisdiction.

1. The choice of respondents, as masters of their complaint, not to sue any non-diverse defendants is dispositive. The citizenship of the named defendants a plaintiff has chosen to sue determines diversity jurisdiction. In *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), this Court squarely rejected the notion that the

[15] *See United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business"); *United States v. BestFoods*, 524 U.S. 51, 64-65 (1998) (same).

citizenship of a non-named putative defendant must be taken into account in determining whether complete diversity is destroyed. In that case, the Court held that a suit by an injured motorist against the tortfeasor's insurance company satisfied complete diversity, even though the tortfeasor's presence as a defendant would have destroyed diversity. The Court examined the citizenship of the *named* defendant to establish diversity and determined that the plaintiff could choose whether to sue the non-diverse tortfeasor; it was immaterial that the suit against the insurer would "encompass[] proof of the tortfeasor's negligence." *Id.* at 51. There was no reason to disregard the citizenship of the insurer simply because the non-diverse insured might also have been sued, much less to treat a non-named party as the true defendant. "Thus a complete disposition of the entire claim may be made in this one action, without injustice to any of the participants." *Id.* at 52. Applied to the facts here, therefore, *Lumbermen's Mutual* stands for the proposition that the existence of a non-named, non-diverse defendant against whom respondents might have a cause of action is irrelevant. It cannot destroy diversity against defendants actually named.

In the closely related area of federal-question jurisdiction, the right of removal is likewise based on what the plaintiff alleges – not on what might have been alleged. Thus, "since the plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables him, 'by eschewing claims based on federal law, . . . to have the cause heard in state court.'" *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1989)) (ellipsis in original); *see also Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). Likewise, a plaintiff's state-court case becomes removable if the complaint alleges a federal claim. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997) ("ICS errs in relying on the established principle that a plaintiff, as master of the complaint, can choose to have the cause

heard in state court. By raising several claims that arise under federal law, ICS subjected itself to the possibility that the City would remove the case to the federal courts.") (internal quotation marks and citation omitted).

There simply is no reason to ignore these long-established principles and cast aside the master-of-the-complaint rule in the diversity context whenever a plaintiff fails to sue all possible defendants, loses on the merits in federal court, and seeks to try the case again in state court by identifying a potentially non-diverse, putative defendant. That rule would only create a re-litigation catastrophe, as numerous losing plaintiffs in removed cases would no doubt seek a post-judgment remand based on the discovery of a non-diverse, putative defendant that they, for whatever reason, did not sue at the outset. Diversity jurisdiction, like that based on a federal question, must be based on what a plaintiff alleges against named defendants – not what the plaintiff might have alleged against non-named defendants.

In this case, respondents filed their motion to remand a mere six days after the district court dismissed their original complaint. *See supra* p. 6. Whether that shows respondents were dilatory or strategic in holding back a jurisdictional issue until shortly after they had lost on the merits, the result is the same. Respondents chose whom they wanted to sue, and a rule permitting them to cast about for jurisdictional spoilers they could have named, but chose not to name, in their complaints finds no support in statutory or doctrinal law. As this Court has similarly explained in a case vacating a lower-court dismissal for the plaintiff's failure to name a supposedly indispensable, non-diverse party, "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968).

Aside from the decision below, the courts of appeals have generally applied that understanding of procedural

law. In *Simpson v. Providence Washington Insurance Group*, 608 F.2d 1171 (9th Cir. 1979), for example, then-Judge Kennedy's opinion for the Ninth Circuit found diversity jurisdiction proper where the plaintiff "chose to sue the Rhode Island parent corporation" rather than a non-diverse affiliate. *Id.* at 1173. The court explained that, because "the parties are diverse and the amount-in-controversy requirement is satisfied, our only inquiry is whether this jurisdiction must be disregarded because the diversity is improper or collusive." *Id.*; *see* 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."). Because a "plaintiff ordinarily is free to decide who shall be parties to his lawsuit," 608 F.2d at 1174, diversity jurisdiction was proper in *Simpson* even though the plaintiff arguably *could have* named as a defendant a non-diverse affiliate of the diverse parent corporation.[16] To like effect is the Fifth Circuit's decision in *Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 252 (5th Cir. 1973), where the court opined, "[t]he citizenship of one who has an interest in the lawsuit but who has not been made a party to the lawsuit by plaintiff cannot be used by plaintiff on a motion to remand to defeat diversity jurisdiction." Thus, because respondents chose to sue only diverse defendants, removal was proper and the Fourth Circuit erred in holding that non-named entities could be

[16] Then-Judge Thomas has similarly explained that the failure to name a non-diverse entity that could have been sued as a defendant in no way defeats diversity, even if the non-joinder was due to collusion (which is not the case here). "Congress has so far proscribed only collusive joinder meant to invoke federal jurisdiction, *see* 28 U.S.C. § 1359; parties may still obtain a federal forum by colluding not to join." *Western Maryland Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 964 (D.C. Cir. 1990) (Thomas, J.) (holding that defendants in one suit could be sued in a second suit by a wholly owned subsidiary of a plaintiff in the original suit, even though the cases were consolidated and diversity would have been lacking had the two suits been brought as one).

considered in determining whether complete diversity was satisfied.

2. A second analogous principle is that a plaintiff can dismiss voluntarily a non-diverse party to create diversity. If a plaintiff has license to create diversity jurisdiction in that manner, then it makes no sense to defeat a defendant's removal based on an entity the plaintiff has *not* sued. This Court's decisions support the proposition that, even *after* filing suit, a plaintiff may voluntarily dismiss a non-diverse defendant that was properly named, in order to create diversity jurisdiction where none existed at the time of filing. *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996) (plaintiff's settlement with and voluntary dismissal of non-diverse defendant created requisite diversity); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) ("[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.").[17] Important here, the Court in those circumstances found it an "overriding consideration" that, "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Caterpillar*, 519 U.S. at 75 (parallel citations omitted).[18]

[17] *See also Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 281 (1918) (plaintiff can cure lack of diversity "by the voluntary dismissal or nonsuit by him of a party or of parties defendant"); *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915) ("voluntary" "dismissal as to resident defendants . . . so as to leave a controversy wholly between the plaintiff and the nonresident defendant"); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873) ("The objection to the jurisdiction of the court, that two of the defendants were residents of Texas, the same State with the complainants, was met and obviated by the dismissal of the suit as to them.").

[18] Those considerations of finality for a judgment on the merits are equally present in a case, such as this one, fully litigated on summary judgment.

Accordingly, respondents' failure here to name such an additional defendant (either in the original complaint or subsequently) cannot be deemed to destroy the diversity jurisdiction that plainly exists between respondents and the defendants (petitioners) that respondents chose of their own accord to sue.

It plainly would be inconsistent to give the plaintiff the power to create diversity where none would exist by dismissing a non-diverse defendant, but not to permit the very same result when the plaintiff fails to sue or join a non-diverse party at all. Yet the Fourth Circuit's holding that Lincoln had to prove the diversity of non-named affiliates to the suit leads to that flawed result. The court's error is well-illustrated by its treatment of the conversion claim – the only claim alleged against Lincoln that respondents chose to appeal. The court noted respondents' contention that both "Lincoln and Barco (the Virginia environmental company hired by Lincoln to perform mold remediation) were 'bailees' of their property" and cited respondents' own failure to name Barco as a defendant as "[a]nother reason jurisdiction may be lacking." Pet. App. 13a n.12. While the court opted to "defer further consideration of this concern," *id.* at 14a n.12, its suggestion that respondents' failure to name Barco as a defendant would destroy diversity – even assuming Barco were a Virginia citizen, which it is not[19] – was flatly wrong because it was for respondents to decide whether or not to name Barco, and they decided not to do so. Indeed, had respondents done so initially, they could still have created diversity by dismissing their claims against Barco, *see supra* p. 21, so there is no basis for concluding that jurisdiction could be destroyed by a decision *not* to sue Barco.[20]

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[19] Petitioners on remand showed that Barco is a Maryland corporation with its principal place of business in Maryland. *See* Tab 1 to Lincoln's Reply in Support of Its Motion for Relief from Mandate and, in the Alternative, To Present New Evidence (filed Aug. 17, 2004).

[20] Respondents also declined in their second amended complaint to sue INVESCO, which was a named defendant in their original complaints. In any case, INVESCO was diverse because, as petitioners' notices of removal explained, "INVESCO is a Delaware corporation with its principal place of business in Georgia." JA 77, 81.

Respondents likewise declined to name as defendants the manufacturer or installer of the plumbing pipe they claim was defective and caused the mold. *See* JA 30, 56, 118 (alleging defendants were liable for "failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits"). But applying the court of appeals' faulty analysis would make a jurisdictional issue of respondents' decision not to sue them as well.

The fact that there are multiple "parties in interest" that a plaintiff *might* have "properly joined and served" under the removal statute (§ 1441(b)) does not give a court the authority to dismiss a case because of the plaintiff's failure to do so, even if a putative defendant would have destroyed complete diversity had it been named as a defendant after the lawsuit had been removed. To hold otherwise would only encourage sandbagging, for plaintiffs could sue fewer than all possible defendants in federal court and then claim lack of diversity if unsuccessful in order to try again in state court by revealing a non-named, non-diverse party that it could have named as a defendant. This Court has precluded similar gamesmanship by plaintiffs seeking to defeat removal based on diversity by subsequently reducing the amount of damages sought in the original complaint. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. . . . [T]he plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election."). There is no reason to endorse the

Fourth Circuit's rule that enables plaintiffs to engage in similarly objectionable gamesmanship.

C. The Court Of Appeals' "Real Party In Interest" Analysis Is Fundamentally Misguided

Although the Fourth Circuit did not explain the statutory basis for its analysis – and there is nothing in the removal statute that would justify its approach – the court appears to have taken the words "parties in interest" in § 1441(b) and conflated that phrase with the concept of "real party in interest," a term used in Federal Rule of Civil Procedure 17(a). *See* Pet. App. 17a n.17 ("joinder of the 'real party in interest' would be required under Rule 17(a)"). The court then compounded its error by misunderstanding this Court's cases involving a "real party in interest" analysis, which arise in a very different context. Both mistakes led the court of appeals to the erroneous holding that the citizenship of "some Lincoln entity related to this action," *id.* at 11a, is as important as the "real party in interest" in the case. That analysis is deeply flawed.

1. The Fourth Circuit's implicit references to the removal statute and procedural rules were mistaken. *First*, the court's holding finds no support in § 1441(b), which limits the class of "parties in interest" to those that are "properly joined and served as defendants." Under the plain language of § 1441(b), there was simply no basis for the court to look outside the named defendants in respondents' action to ascertain the citizenship of "some Lincoln entity related to this action." Pet. App. 11a. EQR, the Lincoln affiliate the Fourth Circuit thought was the "real party in interest," was never "joined and served as [a] defendant[]" in this lawsuit. Its citizenship is therefore irrelevant to a determination of complete diversity of the defendants that were named in the suit, Lincoln and SWIB.

Second, § 1441(b)'s phrase, "parties in interest properly joined and served," is best understood to refer to the Court's longstanding principle of ignoring formal,

nominal, or fraudulently joined parties in determining whether diversity exists. "Jurisdiction cannot be defeated by joining formal or unnecessary parties." *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182, 189-90 (1924) (non-diverse trustee obligated to pay deposited money to winner of suit did not destroy diversity). And the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (non-diverse employee of corporate defendant did not destroy diversity where plaintiff had no good-faith intention to prosecute a claim against that employee).[21] In these inquiries, the Court looks only at the *named* defendants to determine whether the citizenship of any of them should be disregarded for purposes of determining whether diversity exists. But the analysis does not assess the citizenship of putative defendants *not named* in the complaint.

Third, although Federal Rule of Civil Procedure 17(a) employs the phrase, a "real party in interest," the court of appeals' analysis is flatly inconsistent with that rule. Rule 17(a) does not use that term to determine whether defendants may remove an action. Rather, the "real party in interest" analysis in Rule 17(a) requires a court to determine that "[e]very action shall be *prosecuted* in the name of the real party in interest." Fed. R. Civ. P. 17(a) (emphasis added); *see also id.* (certain representatives "*may sue* in that person's own name without joining the

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[21] *See also, e.g., Geer v. Mathieson Alkali Works*, 190 U.S. 428, 433-37 (1903) (non-diverse corporate directors held to be nominal parties when relief sought against both the company and its directors is to be recovered from the company only); *Walden v. Skinner*, 101 U.S. 577, 589 (1879) (non-diverse trustee defendant "would not defeat the jurisdiction in a case where he is a mere nominal party, and is merely joined to perform the ministerial act of conveying the title if adjudged to the complainant"); *Removal Cases*, 100 U.S. 457, 469 (1879) (railroad was nominal party for removal purposes after it resolved its dispute with defendant and it had no common interest with the trustee plaintiffs).

party for whose benefit the action is brought") (emphasis added). "By its very nature, Rule 17(a) applies only to those who are asserting a claim." 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543, at 339 (2d ed. 1990) ("Wright & Miller"); *accord Simpson*, 608 F.2d at 1173 n.2 (Kennedy, J.) ("The real party in interest concept is correctly applied only to those persons prosecuting an action, not to a defendant."). Where a defendant does not assert a counterclaim or third-party claim, as in this case, the "real party in interest" analysis simply is irrelevant in determining the status or citizenship of the named defendants to the lawsuit.

The purpose behind identifying the "real party in interest" is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17 advisory committee notes (1966 Amendment). In sharp contrast to Rule 17(a)'s express limitation to plaintiffs, Rules 17(b) and 17(c) apply to both plaintiffs and defendants alike. Rule 17(b) controls a person's "capacity to *sue or be sued*" (emphasis added), and Rule 17(c) provides that an infant or incompetent person's "representative may *sue or defend* on behalf of the infant or incompetent person" (emphasis added). Thus, the intentional omission of defendants in the real-party-in-interest concept of Rule 17(a) provides ample support that a court is not to engage in a "real party in interest" analysis for defendants to determine complete diversity. *Cf. Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

2. The court's error also stemmed from a grave misreading of this Court's cases addressing the principle that

"the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be *real and substantial parties* to the controversy." Pet. App. 4a (quoting *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980)). The court below accurately quoted *Navarro Savings*, but misunderstood that case. In *Navarro Savings*, this Court invoked the notion of "real parties to the controversy" (446 U.S. at 461) to determine whether the plaintiff trustees who had invoked diversity jurisdiction under § 1332(a)(1) were the real parties in interest in bringing the lawsuit. That case does not address the situation presented here – where all the defendants are completely diverse from the plaintiffs and the court speculates that other, non-named entities might also have an interest in the outcome as defendants.

In *Navarro Savings*, the defendants sought to defeat complete diversity by asserting that a court must consider the citizenship of the beneficial shareholders of a trust even though they were non-parties who were aligned with the plaintiffs to the complaint. *Id.* at 460. But this Court rejected that argument, stressing that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. The trustees in this case have such powers." *Id.* at 464 (footnote omitted). The Court's holding in *Navarro Savings* thus rested on the unique structure of a trust; the "real party in interest" analysis was used to ascertain the citizenship of the *plaintiffs*; the Court looked at the citizenship of third parties to determine whether the fact that they could benefit from the recovery required consideration of their citizenship; and the judgment in fact *upheld* complete diversity. The Fourth Circuit therefore had no basis for concluding that *Navarro Savings* authorizes a court to look outside the complaint and beyond the named

defendants to determine whether complete diversity has been destroyed.[22]

D. The Fourth Circuit's Rule Functionally Abrogates Federal Rule Of Civil Procedure 19

Adoption of the lower court's disruptive and indeterminate "real party in interest" analysis would strip Federal Rule of Civil Procedure 19 of its significance. That rule, entitled "Joinder of Persons Needed for Just Adjudication," governs the analysis of when a suit must be dismissed due to the non-joinder of a party deemed "indispensable" because a court should not "in equity and good conscience" "proceed among the parties before it." Fed. R. Civ. P. 19(b). Without referencing Rule 19, the Fourth Circuit concluded *sua sponte* that "both the Texas parent [*i.e.*, Lincoln] and the Virginia sub-'partnership' [*i.e.*, EQR] should be parties to the instant action." Pet. App. 16a. That conclusion was tantamount to a ruling that EQR was an indispensable party, without whose presence the case could not proceed. But respondents never once sought to add EQR (or any other non-party) as a defendant under Rule 19 or any other theory, despite filing two amended complaints and then moving voluntarily to dismiss one of their claims in the second amended complaint.

Rule 19 makes plain that there is no cause here to reform respondents' unilateral choice of whom to sue, even assuming they had timely sought to join EQR, which they never did. Then-Judge Thomas has explained how Rule 19 operates:

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[22] Nor, as we explain in the petition (at 12-14), was the Fourth Circuit correct to rely on several court of appeals' decisions. Particularly far afield was that court's reliance on the principle that the alter ego of a state is not a "citizen" of the state for diversity purposes. *See* Pet. App. 5a (citing *Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents*, 737 F.2d 540, 543-44 (6th Cir. 1984)); *see State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929) ("The state acting through the highway commission, as it might through any officer, became a party to the original agreement and obligated herself thereby."). There is no suggestion that Lincoln was the alter ego of a state.

> When a party to a federal lawsuit moves to join a nonparty resisting joinder, the district court must answer three questions: Should the absentee be joined? If the absentee should be joined, can the absentee be joined? [Rule 19(a).] If the absentee cannot be joined, should the lawsuit proceed without her nonetheless? [Rule 19(b).] "To use the familiar [if] confusing terminology," *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968): Is the absentee's presence necessary? If the absentee's presence is necessary, is her joinder feasible? If the absentee's joinder is not feasible, is she indispensable?

Western Maryland Ry., 910 F.2d at 961 (third alteration in original; footnotes and parallel citations omitted).[23]

Importantly, the Rule 19 inquiry is *not* a jurisdictional rule, but rather is based on equity. As Chief Justice Marshall explained for the Court, the objection of a failure to join an indispensable party "does not affect the jurisdiction, but addresses itself to the policy of the Court." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166 (1825); *see also Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827) ("We do not put this case upon the ground of jurisdiction"); *Provident Tradesmens*, 390 U.S. at 120-21 (citing *Elmendorf* and *Mallow*); *Simpson*, 608 F.2d at 1174 n.4 (Kennedy, J.) ("Failure to join indispensable parties does not oust jurisdiction."). Thus,

> it is important to recognize that the court does have jurisdiction both over the parties properly before it and the subject matter of the action, even though the indispensable party cannot be joined. The decision by the court not to proceed is based on equitable considerations alone. Because the doctrine of indispensability is equitable in character, the court will

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[23] The full text of Federal Rule of Civil Procedure 19, which sets out multiple factors for a court to consider, is set forth in the addendum to this brief.

not dismiss for nonjoinder when special circumstances would make it inequitable to do so.

7 Wright & Miller, § 1611, at 169 (3d ed. 2001) (footnote omitted).

Although a Rule 19 analysis should be completely unnecessary to a proper decision whether removal is appropriate in this case, we set forth below the reasons why EQR – the entity the Fourth Circuit thought should destroy diversity – is neither a necessary nor an indispensable party.

1. EQR is not a necessary party

EQR is not a necessary party under Rule 19(a), much less an indispensable one under Rule 19(b). The court below stated that "[respondents] contend that Lincoln's Virginia entity is the real and substantial party in interest, without whom they cannot be made whole." Pet. App. 7a n.5. Even if that were true – for example, because respondents sued the wrong defendant – it would be irrelevant. This Court has made that clear in a seminal decision applying Rule 19 and vacating a court of appeals' *sua sponte* holding that a non-party was indispensable. When the plaintiff has been dilatory in asserting its own interest under Rule 19, that interest simply cannot be counted as a reason for upsetting a final judgment: "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about sufficiency of the relief obtainable against them." *Provident Tradesmens*, 390 U.S. at 111.[24] That should be the end of the matter, and there is no other reason to hold that EQR is a necessary party. That is true with respect to both the tort and contract claims respondents have asserted.

[24] While in *Provident Tradesmens* the plaintiffs had also chosen the federal forum, in this case the plaintiffs never sought, in either of the courts below, to obtain a remand by joining a non-diverse defendant. They therefore should not be heard to complain, now that they have suffered an adverse judgment, about their own voluntary failure to seek to join EQR as a defendant.

a. EQR is not a necessary party to respondents' tort claims. "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (per curiam) (citing cases); *see* Fed. R. Civ. P. 19 advisory committee notes (1966 Amendment) (Rule 19 incorporates the "settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability. Joinder of these tortfeasors continues to be regulated by Rule 20 . . . .") (citations omitted).

Here, nine of the 12 original claims alleged by Mr. Roche (and eight of the 11 original claims alleged by Mrs. Roche) were tort claims based on common law or Virginia statute. *See supra* p. 3 n.1 (setting out alleged claims). Respondents' second amended complaint, in turn, alleged only two tort claims: negligence and conversion. Respondents did not, however, appeal the dismissal of any of their original claims or the second amended complaint's negligence claim. Accordingly, because respondents voluntarily ceased to advance their dismissed claims on appeal, only the conversion claim could be relevant here.[25]

In any event, a potential joint tortfeasor – which is what EQR would be – is a "merely permissive part[y]."

[25] Ordinarily, the Court looks at the suit as it was originally filed in determining whether removal was proper. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 390 (1998) ("[F]or purposes of removal jurisdiction, we are to look at the case as of the time it was filed in state court – prior to the time when the defendants filed their answer in federal court."). When the plaintiff voluntarily drops claims or parties after removal, however, the removal analysis is governed by the new posture of the case. *See supra* p. 21. Accordingly, the Court may examine the propriety of removal here based solely on the conversion claim, for respondents voluntarily declined to advance any other claim against Lincoln in their Fourth Circuit appeal. *See Quinn v. Aetna Life & Cas. Co.*, 616 F.2d 38, 40 n.2 (2d Cir. 1980) (per curiam) ("plaintiffs' failure to take an appeal constituted the functional equivalent of a 'voluntary' dismissal" for purposes of § 1441 removal); *see also Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 72 n.3 (7th Cir. 1992) (suggesting agreement with *Quinn* but not reaching the issue).

Temple, 498 U.S. at 8. As Professors Wright and Miller have explained, "joinder has not been required of principals and agents, or parent and subsidiary corporations who may be jointly and severally liable." 7 Wright & Miller, § 1623, at 365-66 (citing cases; footnotes omitted).

Thus, in *Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132 (1st Cir. 1989), then-Judge Breyer's opinion held that a non-diverse subsidiary of Shearson, the named corporate defendant, was not a necessary party because Shearson would want to defend by showing that "no one behaved improperly at its Subsidiary, that Pujol's charges were without foundation, and that its own actions in response to Pujol's baseless accusations were therefore reasonable. This is precisely what the Subsidiary would wish to show." *Id.* at 135. Accordingly, the plaintiff's failure to name the subsidiary would not "'as a practical matter impair or impede' the Subsidiary's 'ability to protect [its] interest'" in the suit against its corporate parent. *Id.* (quoting Rule 19(a)(2)(i)). The same is true here, for Lincoln would want to – and did in fact – defend vigorously against any claims that it and an affiliate using its trade name acted improperly. *See id.* ("Shearson's counsel's motives and ability to defend *Shearson* do not differ significantly, as a practical matter, from Shearson's counsel's motives and ability to defend the *Subsidiary's* interests as well.").[26]

b. EQR is not a necessary party to respondents' contract claims. Counts II-IV of the original complaints alleged that petitioners breached their contract in three respects. *See* JA 40-44, 66-70. But the Roches sued the *only* parties named on the lease – SWIB, the owner of the

[26] The First Circuit in *Pujol* also held that it made no difference whether the plaintiff might seek to introduce evidence that the subsidiary was an "active participant" in the alleged wrongdoing. "Given the vast range of potential insults and allegations of impropriety that may be directed at non-parties in civil litigation, a contrary view would greatly expand the universe of Rule 19(a) necessary parties." *Pujol*, 877 F.2d at 136.

Westfield apartments, and Lincoln, as SWIB's "authorized agent."[27] The lease does not even mention EQR. It should be self-evident that a non-party to a contract is not a necessary party to a lawsuit on that contract. *See, e.g., Conn-Tech Dev. Co. v. University of Connecticut Educ. Props., Inc.*, 102 F.3d 677, 682 (2d Cir. 1996) ("A nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract.") (internal quotation marks omitted).

In any case, the second amended complaint did not allege *any* contract claims against Lincoln, and respondents chose voluntarily not to appeal the dismissal of any of their original contract claims. The two contract claims in the second amended complaint (one of which respondents voluntarily dismissed, *see* JA 182) were alleged against SWIB only. *See* JA 131-33. Respondents decided to focus their contract theories solely on SWIB after the district court ruled that their original complaints violated Rule 8(a)(2) because they failed to give petitioners fair notice of which claims were being alleged against which petitioner and ordered respondents to file the second amended complaint if they wished to proceed on those claims. As this Court recently held in finding a complaint deficient under Rule 8(a)(2), "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627, 1634 (2005). Thus, it is clear that respondents chose voluntarily not to allege any contract claims at all against Lincoln in their second amended complaint, although they were certainly free to try under the district court's Rule 8(a)(2) holding.

[27] The lease was signed on behalf of SWIB by Matthew Levis for "Lincoln Property Company ECW, Inc. Agent," as "Lincoln Property Company Agent." JA 94. Instead of also naming Lincoln Property Company ECW, Inc. as a defendant, respondents chose, for whatever reason, to caption their complaints as against "Lincoln Property Company t/a Lincoln Property Company ECW, Inc." JA 26, 52.

Accordingly, the contract claims respondents chose to pursue only against SWIB have no relevance in determining whether *any* Lincoln affiliate might be a "necessary" party within the meaning of Rule 19(a).

2. EQR is not an indispensable party

It is axiomatic that, if EQR is not a "necessary" party under Rule 19(a), it cannot possibly be an "indispensable" party under Rule 19(b). However, even assuming EQR's status as a "necessary" party, it fails to meet the requisites of an indispensable party under Rule 19(b).

In *Provident Tradesmens*, Justice Harlan explained in a unanimous opinion how to apply Rule 19(b), and that analysis makes clear that EQR could not be deemed an indispensable party. That case was a diversity suit concerning a fatal automobile accident allegedly caused by the driver of a borrowed car. Three of the injured parties (or their estates) sued the car owner's insurance company for damages on the theory that the driver had the owner's permission to drive the car and was thus covered by the owner's insurance policy. *See* 390 U.S. at 104-05. The car's owner, Edward Dutcher, however, was not named as a defendant; if he had been, then diversity would have been destroyed. *See id.* At trial, the jury found that the driver had Dutcher's permission and awarded damages to the plaintiffs against Dutcher's insurance company. On appeal, the court of appeals *sua sponte* dismissed for lack of diversity on the ground that Dutcher was an indispensable party. *See id.* at 106-07.

This Court reversed, relying partly on the fact that the defendant insurance company – the losing party – had never sought to join Dutcher in the district court. The Court found that the "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage." *Id.* at 112; *see also Caterpillar*, 519 U.S. at 75 (finding same concern in preserving final judgment "overwhelming"). The Court found such "[o]pposing considerations" to be "hard to find" where the losing parties

at trial had "showed no interest in joinder until the Court of Appeals took the matter into its own hands. This properly forecloses any interest of theirs." 390 U.S. at 112.

Likewise, in this case Lincoln and SWIB have a strong interest in preserving the fully litigated judgment they obtained in the district court,[28] and respondents never sought to join EQR as a defendant in either the district court or the court of appeals. To accept the Fourth Circuit's approach or to view EQR as an indispensable party would give plaintiffs an incentive and opportunity to game the system by declining to name certain non-diverse parties as defendants only to assert, after suffering an adverse judgment, that the court lacked jurisdiction and should remand the case for a new start in state court. That is why the Court explained in *Provident Tradesmens* that "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." 390 U.S. at 111. *Cf.* Fed. R. Civ. P. 12(h)(2) (indispensable-party defense may be asserted only until trial). That principle has even more force here, where EQR's interests are protected by Lincoln's defense of the suit against it.[29]

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[28] As respondents themselves explained to the district court in their motion to remand, "[a]n immense amount of time, energy and resources of plaintiffs' counsel, as well as this Court have been exhausted because everyone believed that subject matter jurisdiction existed. Five different Motions with Memorandums were argued before Magistrate Judges; two more conducted by telephone conference. Your Honor and your staff heard a lengthy Motion to Dismiss; *Daubert* Motion to Exclude Experts; and a Motion for Summary Judgment. Voluminous documents and exhibits have been filed." C.A. App. 1528.

[29] In addition, now that Lincoln has won summary judgment on all claims in the district court, there is no longer a danger to EQR of an adverse judgment affecting its interest. *See Provident Tradesmens*, 390 U.S. at 110-11 ("The judgment appealed from may not in fact affect the interest of any outsider even though there existed, before trial, a possibility that a judgment affecting his interest would be rendered."); *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 71 (1936) ("[S]ince the bill states no cause of action against any one, the rights of absent parties are in no way threatened by it, and to enter upon a consideration

Nor should respondents be allowed now to assert protection of EQR's interest (they have never before attempted to do so), for that would plainly be a self-serving attempt to gain a remand and fresh start in state court in order to escape the adverse judgment they suffered in federal court. *Cf. Provident Tradesmens*, 390 U.S. at 110 ("After trial, . . . if the defendant has failed to assert this interest [in avoiding multiple litigation], it is quite proper to consider it foreclosed.").[30]

E. The Fourth Circuit's Rule Would Produce Massive Uncertainty And Unwarranted Litigation

This Court has frequently made clear that "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1930 (2004). It has emphatically declined to create jurisdictional rules that "would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Thus, jurisdictional rules have been designed "to avoid . . . uncertainty and litigation over the preliminary issue of the forum's competence." *Burnham v. Superior Court of California*, 495

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of the question of their indispensability would be a vain waste of time.").

[30] Although it cited the *Provident Tradesmens* case, the court of appeals deemed that case irrelevant because it arose under Rule 19. *See* Pet. App. 7a n.5. In addition, the Fourth Circuit's description of the case got it exactly backwards by erroneously reporting that the non-joined party was "an insurance company who had, at best, a tangential interest in the pending claim." *Id.* Contrary to the lower court's misreading, however, the insurance company *was* joined, and the insured – who faced liability over and above his policy limit in subsequent suits and thus had an obvious and substantial interest in preserving the $100,000 fund – was *not* joined and was nevertheless found *not* to be indispensable.

U.S. 604, 626 (1990) (plurality); *see also Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (Court should avoid jurisdictional "tests produc[ing] the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible").[31]

This Court has never sanctioned the wide-ranging inquiry into non-named entities that a plaintiff might have named in the complaint. But that is precisely what the Fourth Circuit's misguided rule requires. The massive uncertainty and collateral litigation flowing from that approach plainly counsel against changing course now. *See Grupo Dataflux*, 124 S. Ct. at 1930 ("The stability provided by our time-tested rule weighs heavily against the approval of any new deviation."). In contrast, the district court below appropriately examined the citizenship of the defendants actually named in respondents' complaint, and even indulged respondents' speculation about EQR, even though nothing in the Federal Rules of Civil Procedure or this Court's cases obliged it to do so. The Fourth Circuit's

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[31] The boundary between judicial power and nullity should . . . , if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising "questions of penumbra, of shadowy marches," two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there.

Sisson, 497 U.S. at 375 (Scalia, J., concurring in the judgment) (quoting Zachariah Chafee, The Thomas M. Cooley Lectures, *Some Problems of Equity* 312 (1950) (quoting, in turn, *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring))).

rule imposes a burden on a defendant to prove a negative – that there is no other possible non-named defendant who might have an interest in the lawsuit and that, if there are, those non-named putative defendants also are completely diverse from the plaintiffs. Such open-ended and standardless requirements should not be engrafted onto removal determinations, which occur thousands of times per year in the federal courts.

F. This Court Should Express Disfavor With The Fourth Circuit's *Sua Sponte* Reversal

The court of appeals might have avoided its errors had it asked the parties to address in supplemental briefing the jurisdictional issue about which the court had become concerned. Instead, the court created its own flawed legal rationale and then misapplied the facts to it, without giving petitioners notice or an opportunity to be heard on that issue. Lincoln had no cause to brief that issue because, on appeal, respondents did not challenge the district court's ruling that Lincoln was diverse to respondents.[32] This Court should therefore instruct courts of appeals not to engage in the types of *sua sponte* decisionmaking engaged in by the Fourth Circuit below absent extraordinary circumstances.

As a matter of elemental due process, this Court has long held that the Constitution, at a minimum, requires

[32] Although respondents did file a post-judgment motion to remand in the district court, they did so based on the theory that "Defendant Lincoln is not a Texas corporation, but rather is not a corporation at all and, instead, is a partnership with a partner who is a Virginia resident." Pet. App. 8a. But that was a different theory from the far-reaching one invented by the court of appeals, which required petitioners to negate the existence of "some" non-diverse and non-named "Lincoln entity related to this action" and to establish the degree of that entity's "nexus" with Virginia. *Id.* at 11a; *see also id.* at 17a (requiring "sufficient indicia – by a preponderance of the evidence – that one member of the Lincoln group of companies doing business in Virginia is not a citizen of the Commonwealth [of Virginia]"). Lincoln thus had no reason to submit evidence or argument to meet the curveball presented by the court of appeals' unprecedented jurisdictional rule.

prior notice and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). These procedural due process safeguards are deeply rooted in our judicial system. *See Rochin v. California*, 342 U.S. 165, 170-71 (1952). The Fourth Circuit denied Lincoln those procedural protections when it ordered the case to be remanded *sua sponte* to state court without input from the parties. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000) (party must be "afforded a proper opportunity to respond to the claim" before it is adjudicated against that party); *Boddie*, 401 U.S. at 377 ("[P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."); *Mullane*, 339 U.S. at 314 ("[t]he notice must be of such nature as reasonably to convey the required information"). While, in this case, Lincoln was fortunate that this Court granted certiorari to review the Fourth Circuit's decision, in the vast majority of cases a court of appeals' *sua sponte* disposition of the case would be the end of the line.[33]

Surprise *sua sponte* judicial decisionmaking is fundamentally at odds with our adversary system of justice. "If

[33] Lincoln's opportunity under appellate rules of procedure to request a rehearing (which it, in fact, did) cannot substitute for the type of process necessary to present its jurisdictional arguments to counter the *sua sponte* decision of the court. As is the case with the vast majority of all such petitions, the rehearing petition here was summarily denied. Because there is such a heavy presumption against the likelihood that a rehearing petition will have merit, arguments that might have carried the day simply are not given the same credence as if they had been presented when the case was still being briefed, argued, and considered for decision by the panel. As the federal courts of appeals have recognized, a summary denial of a rehearing petition does not constitute a decision on the merits of the arguments raised in the petition. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479-80 (Fed. Cir. 1998) (collecting cases). Thus, a summary denial of a rehearing petition does not provide the opportunity to be heard required by the Fifth Amendment.

notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, and with that, the possibility of an incorrect result." *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) (citation omitted). Thus, if a "hearing is to ensure fairness, it must provide [the affected party] an opportunity to present her case effectively" before issues are resolved without proper briefing and argument. *Landon v. Plasencia*, 459 U.S. 21, 36-37 (1982). As similarly expressed by Judge Friendly, "[t]he district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986).

To be sure, a court has an independent duty to ensure that it has jurisdiction to address the merits. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). But to raise and decide *sua sponte* a jurisdictional issue that has the effect of overturning a judgment on the merits without giving the adversely affected party notice and an opportunity to be heard present very different concerns. Thus, as the Seventh Circuit has explained, "even when the dismissal is on jurisdictional grounds, unless the defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction." *Shockley v. Jones*, 823 F.2d 1068, 1073 (7th Cir. 1987). "Notice serves several important purposes. It gives the adversely affected party a chance to develop the record to show why dismissal is improper; it facilitates *de novo* review of legal conclusions by ensuring the presence of a fully-developed record before an appellate court; and, it helps the trial court avoid the risk that it may have overlooked valid answers to what it perceives as defects in plaintiff's case." *McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001) (citations omitted).

The Fourth Circuit here overlooked numerous "valid answers" (*id.*) to its questions, both legal and factual. *See supra* pp. 14-38; *infra* pp. 41-48. This Court should make clear that such *sua sponte* decisionmaking without giving the parties an opportunity to address the issue of a possible jurisdictional flaw is strongly disfavored and should be reserved only for exceptional circumstances.

II. THE CITIZENSHIP OF A LIMITED PARTNERSHIP IS BASED SOLELY ON THE CITIZENSHIP OF EACH PARTNER – NOT ON WHETHER THE PARTNERSHIP HAS A "VERY CLOSE NEXUS" WITH THE STATE OF PLAINTIFFS' CITIZENSHIP

Even assuming the court of appeals properly considered the citizenship of EQR – a non-named limited partnership that respondents *never* sought to join despite having had every opportunity to do so – that court misapplied this Court's precedents for determining the citizenship of a limited partnership. This Court has squarely rejected the "very close nexus" test fabricated and applied by the court of appeals in its flawed *sua sponte* decision. *See* Pet. App. 16a. And, under this Court's controlling test, EQR is a citizen of Texas because all of its partners (both general and limited) are citizens of Texas. It is therefore diverse from the Virginia plaintiffs. Although this Court conceivably could decide this case solely on the first issue, it should also reverse the Fourth Circuit on the second question because its flawed analysis of diversity for limited partnerships creates great uncertainty for the business community.

A. Limited Partnership EQR's "Nexus" Of Activities To Virginia Is Irrelevant To Determining Its Citizenship For Diversity Jurisdiction

1. This Court's cases hold that a partnership's citizenship is determined by the state of citizenship of its partners. In *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), this Court held that a court must look to the

citizenship of each partner in a limited partnership, both limited and general, in determining whether complete diversity exists. *Id.* at 195. In reaching that conclusion, the Court applied its precedents treating unincorporated associations as having the citizenship of each of its members. *Id.* at 189 (discussing *Chapman v. Barney*, 129 U.S. 677 (1889) ("joint-stock company," *i.e.*, partnership); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900) (limited partnership); and *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (labor union)). Nowhere did the Court in *Carden* suggest that a court may look beyond the entity's membership and assess whether its activities in the forum state constituted a "very close nexus" with that state.

Indeed, the Court long ago rejected the quite similar proposition that an unincorporated association should be deemed a citizen of the state comprising its principal place of business. In *Bouligny*, the Court noted the statutory rule that "'a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.'" 382 U.S. at 148 n.4, 152 (quoting 28 U.S.C. § 1332(c)(1)). But the Court specifically *rejected* application of that principal-place-of-business rule to unincorporated associations, explaining that whether such a rule should be so applied involved "decisions which we believe suited to the legislative and not the judicial branch." *Id.* at 153. Thus, the Court concluded, "[w]hether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes" is "properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court." *Id.* at 147, 153.[34]

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[34] In contrast, the Court has interpreted the venue statute, 28 U.S.C. § 1391(b), to permit suit against an unincorporated association "wherever it is 'doing business.'" *Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 562 (1967) (quoting § 1391(b)). The Court made clear in that context, however, that whether diversity jurisdiction exists is a wholly different, and

The Court later explained that its decision in *Bouligny* meant that the Court, "having entered the field of diversity policy with regard to artificial entities once (and forcefully) [in holding that corporations are citizens of the state of incorporation], we have left further adjustments to be made by Congress." *Carden*, 494 U.S. at 196. Thus, as the leading treatise explains, "the citizenship of all the partners or members of an organization is critical and the state where the limited partnership or other entity is registered or has its *principal place of business is not considered for purposes of removal.*" 14B Wright & Miller, § 3723, at 601 (3d ed. 1998) (emphasis added). Until the Fourth Circuit's aberrant decision here, that principle had been consistently applied by other courts of appeals.[35]

Instead, those courts have given full effect to Congress's legislative determination of which types of business entities should have their citizenship determined, in part, by the state of its principal place of business and which should not be. By statute, Congress has required the citizenship of a corporation to be deemed in part by the state of its principal place of business. *See* 28 U.S.C. § 1332(c)(1). Congress has also done so in another specific instance by declaring that an insurer, "whether incorporated or unincorporated," is a citizen "of the State where it has its principal place of business." *Id.* But Congress has never adopted a principal-place-of-business rule for

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antecedent, question to that of venue. *See id.* at 559, 563 (discussing *Bouligny*).

[35] *See ConnTech*, 102 F.3d at 681 (property-development partnership doing business in defendant's state of citizenship held diverse because its partners were citizens of different states); *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993) (property-development partnership operating in Puerto Rico held not to be a citizen of Puerto Rico because its partners were New York corporations with their principal places of business in New York); *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 357 n.1 (D.C. Cir. 1983) (per curiam) ("For diversity purposes, the citizenship of a limited partnership does not depend upon the state of its organization, the location of its principal place of business, or any of its other features as an entity").

limited partnerships or, more generally, for other types of unincorporated associations, and thus has declined to express any different legislative preference than the construction given by this Court's holding in *Bouligny*.

To be sure, proposals from time to time have been advanced so that "unincorporated associations [are] deemed citizens of the States in which their principal places of business are located." *Bouligny*, 382 U.S. at 153 n.12 (citing American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Proposed Final Draft No. 1 (1965)). Nothing has ever come of those proposals in Congress, however – despite the fact that, as the ALI's reporter has since explained, Congress did adopt other proposals from the same ALI study (which was finalized in 1969) "on a piecemeal basis." John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 872 (1998) ("[A]s a manifesto for change, its reach exceeded its grasp; the 1969 study has had relatively scant impact in reforming the body of law it evaluated."). Thus, given that Congress has declined to adopt a proposal to rest citizenship of an unincorporated association on its principal place of business, the court of appeals' adoption of its "very close nexus" test was patently lacking in statutory or doctrinal support.[36]

2. Even if a "very close nexus" test applies, EQR does not have such a nexus with Virginia. After the Fourth Circuit's remand, Lincoln moved in the district court for relief from the mandate and to present evidence of EQR's business activities in Virginia and elsewhere. Of course, prior to the Fourth Circuit's announcement of its new rule, there was no reason for Lincoln to have placed that

[36] The Fourth Circuit's "very close nexus" rule might well be *broader* than the principal-place-of-business rule Congress declined to adopt. While a corporation can have only one principal place of business, an unincorporated association could plausibly have a "very close nexus" with multiple states, particularly given the lack of any precise standards for determining the sufficiency of a "nexus" with a state.

evidence in the record, and it was not requested by respondents in discovery. That evidence shows that, as of the date of filing of respondents' complaints in state court on August 26, 2002, EQR fee-managed 281 projects, including 79,487 apartment units, in 17 states; only 15, or 5%, of those projects were located in Virginia, and those Virginia projects accounted for only 14% of EQR's total revenues for fee-management services in 2002. *See supra* pp. 11-12. And EQR's headquarters and principal place of business were in Dallas, Texas. *See id.*

B. In Any Case, EQR Is Completely Diverse

Even if the citizenship of non-party EQR mattered, EQR's presence in the case would not destroy diversity based on a straightforward application of the Court's controlling rule in *Carden*. The record plainly shows that EQR, a partnership formed under Delaware law, is a Texas citizen that is completely diverse from respondents, who are both Virginia citizens. Lincoln General Counsel and Vice President Dan M. Jacks submitted a sworn declaration, including corporate and partnership documents filed with the States of Texas and Delaware, explaining that EQR's general and limited partners are both Texas citizens. *See* JA 238-70; *see also* Pet. App. 96a (setting out chart of EQR's partners).

As the district court properly found, *see supra* p. 9, EQR's general partner is Lincoln Eastern Management Corporation ("LEMC"), a Texas corporation with its principal place of business in Dallas, Texas. *See* JA 239 (Jacks Declaration), 247-50 (Certificate of Limited Partnership for EQR, as certified by the State of Delaware), 254-58 (LEMC Articles of Incorporation as certified by the State of Texas).

EQR's limited partners are LEMC (also its general partner, as just discussed[37]) and Lincoln Placeholder

[37] The court of appeals faulted this dual role for LEMC because, in its view, "a limited partner generally may not be a general partner." Pet. App. 13a n.11 (citing two non-Delaware cases). Regardless of

Limited Partnership ("LPLP"). *See* JA 239 (Jacks Declaration), 259-61 (LPLP Certificate of Limited Partnership as certified by the State of Texas), 262-64 (excerpt of LPLP Partnership Agreement). The partners of LPLP, in turn, are as follows: LPLP's general partner is LEMC, a citizen of Texas as discussed above, and its limited partner is Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Dallas, Texas. *See* JA 239 (Jacks Declaration), 265-70 (Articles of Incorporation as certified by the State of Texas).

Respondents did not challenge any of the above evidence,[38] and the district court readily concluded from it

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what other states might require, Delaware law – under which EQR was formed – expressly provides that "[a] limited partner is not liable for the obligations of a limited partnership unless he or she is *also* a general partner" of the limited partnership. Del. Code Ann. tit. 6, § 17-303(a) (emphasis added). This statute would be nonsensical if a limited partner could not be a general partner, as the court of appeals incorrectly surmised without even examining Delaware law. *See Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, No. 315, 1993, 1994 Del. LEXIS 190, at *1 (Del. June 9, 1994) (adjudicating Delaware limited partnership agreement in which one entity "was the sole general partner as well as a limited partner"); *Lubakoff & Altman on Delaware Limited Partnerships* § 5.4, at 5-11 (2005 Supp.) (limited partner may be "shown on a certificate of limited partnership as a general partner" and is thus liable as a general partner). Indicative of the court's faulty analysis here are back-to-back irreconcilable statements in which the court first concluded that "[t]he partnership filings in the record . . . do not disclose the identity or citizenship of **any** of EQR/Lincoln Limited Partnership's limited partners," Pet. App. 12a-13a, but then acknowledged in the footnote attached to that same sentence that "[t]he Limited Partnership Agreement . . . designates Lincoln Eastern Management Corporation as both general and limited partner of EQR/Lincoln Limited Partnership," *id.* at 13a n.11 (citing EQR's partnership agreement at C.A. App. 1576-77, reproduced in JA 251-52). In addition, the court appeared to overlook the fact that LPLP was listed as a second limited partner of EQR on the very next page of the same partnership agreement to which the court had cited. *See* JA 253 (C.A. App. 1578). *But cf.* Pet. App. 13a n.11 (setting out the general and limited partners of LPLP).

[38] Respondents claimed only that they believed that EQR had its "principal place of business" in Virginia. Plaintiffs' Motion for Leave To File Supplemental Brief at 3 (filed June 13, 2003). As discussed above, however, a partnership's "principal place of business" is irrelevant to determining its state of citizenship. *See supra* pp. 41-44.

that EQR was completely diverse from the Roches. *See* Pet. App. 87a-88a. The district court also correctly noted that EQR's citizenship need not even be addressed because it was not a named defendant, but it did so merely to explain why respondents' argument failed for that reason as well. *See id.*; *supra* p. 9.

C. The Fourth Circuit's Indeterminate "Very Close Nexus" Test Would Create Massive Uncertainty

The Fourth Circuit's wayward departure from the controlling rule in *Carden* through articulation of its "nexus" test is the antithesis of a rule of jurisdiction that promotes certainty and ease of administration. The court went so far as to hold that "the citizenship of the nominal parties listed on the Complaint," *i.e.*, the entities that were actually sued, "is in no way dispositive of a subject matter jurisdiction challenge." Pet. App. 17a. Instead, the court of appeals held that a removing defendant "ha[s] the burden" of placing into the record "sufficient indicia – by a preponderance of the evidence – that one member" of the "group of companies doing business in Virginia is not a citizen of the Commonwealth." *Id.* Moreover, the Fourth Circuit demands that removing defendants provide "evidence as to how" entities legally separate from the named defendant and that were not sued "are distinct or uninvolved in" the named defendant's "business enterprises" and "property holdings" in the Commonwealth of Virginia. *Id.* at 11a. That heavy burden would effectively slam shut the doors of the federal courts to companies, like property development and management companies, that do business in multiple states or that partner with local entities to carry out individual projects.

As the *amicus* participation of the Real Estate Roundtable demonstrates, at least one complete sector of the economy – real estate development – conducts business

around the country through these business forms. One reason why those businesses create separate business associations for each development project is so that they can create legal certainty – for liability, tax, security, and other purposes. The Fourth Circuit's rule destroys that certainty by inviting plaintiffs unhappy with removal decisions to scour corporate and partnership records to point to some related, alternative entity that they could have sued – but did not actually sue. In structuring their business affairs, partnerships and unincorporated associations have no way, under the Fourth Circuit's formula, of knowing what constitutes a "nexus" with a state for citizenship in that state to be imputed. That would have a devastating effect on predictability for the more than 2.2 million partnerships in the United States. *See* Tim Wheeler & Maureen Parsons, U.S. Internal Revenue Service, *Statistics of Income Bulletin – Partnership Returns, 2002*, at 46, 47 (Fall 2004) (figures as of 2002), *available at* http://www.irs.gov/pub/irs-soi/02partnr.pdf.

The Fourth Circuit's rule also has a deeper, more insidious effect: it invites plaintiffs to sandbag district courts, as respondents did here. By holding in reserve a possible related business entity, plaintiffs can test-drive their complaint in federal court after removal. If they lose on the merits, as respondents did below, they can raise post-judgment challenges to the court's jurisdiction and seek a remand to state court for a second bite at the apple. The Fourth Circuit's "very close nexus" rule invites plaintiffs to pick away at business affiliates of a named defendant in the hope that some related entity might (a) have some interest in the outcome of the lawsuit to warrant inclusion as a defendant, and (b) have some nexus to the state sufficient to justify deeming it a "citizen" of that state for diversity purposes. Given the tens of thousands of diversity cases filed in and removed to federal courts every year, this Court should not endorse the jurisdictional chaos suggested by the Fourth Circuit's unprecedented and wayward approach to the citizenship of limited partnerships.

CONCLUSION

The judgment of the court of appeals should be reversed.

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ADDENDUM

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STATUTES INVOLVED

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated

or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the

United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not

be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 17 provides:

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Federal Rule of Civil Procedure 19 provides:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plain-

tiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

(9)

No. 04-712

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY, *et al.*,
Petitioners,

v.

CHRISTOPHER ROCHE, *et ux.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE FOR THE REAL ESTATE ROUNDTABLE, NATIONAL MULTI HOUSING COUNCIL, AMERICAN HOTEL & LODGING ASSOCIATION, AMERICAN RESORT DEVELOPMENT ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION, INSTITUTE OF REAL ESTATE MANAGEMENT, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF HOMEBUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, AND NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

This case presents basic jurisdictional issues of exceptional importance to businesses—such as those in the commercial and residential real estate industry—that operate in multiple states through affiliated entities, including partnerships.[1] The overriding question concerns the manner in which federal courts should assess a business defendant's citizenship for purposes of establishing diversity jurisdiction. 28 U.S.C. § 1332(a). That question, in turn, governs the ability of business defendants to invoke their right under 28 U.S.C. § 1441(b) to remove an action to a federal forum. That removal right has long played a vital role in ensuring that, where federal jurisdiction exists, non-resident defendants may access federal courts and, more to the point, "a tribunal free from local prejudice." Pet. App. 15a-16a.

A case is removable if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). This case was filed in Virginia state court. The only parties "properly joined and served as defendants" are petitioners Lincoln Property Company (Lincoln), a Texas corporation with its principal place of business in Texas, and State of Wisconsin Investment Board (SWIB), a Wisconsin entity. It is undisputed that neither defendant is a citizen of Virginia, as are respondents, and that the named parties are therefore diverse pursuant to 28 U.S.C. § 1332(a). Petitioners removed the case from state court to federal court pursuant to Section 1441(b), and the district court entered summary judgment in their favor. Pet. App. 39a, 88a. The Fourth Circuit, however, reversed and remanded with instructions that the case

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[1] Pursuant to this Court's Rule 37.6, amici notes that no part of this brief was authored by counsel for any party, and no person or entity other than amici made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a).

be returned to state court on the ground that defendants had "failed to carry their burden of proof with respect to their allegedly diverse citizenship." *Id.* at 2a.

In at least two critical respects, the Fourth Circuit's decision disrupts the settled framework for determining the citizenship of business defendants. First, the decision instructs courts to look beyond the citizenship of the defendant named in the complaint and to identify non-named affiliates that may destroy diversity under a "real parties in interest" analysis. Pet. App. 14a. Second, the decision concludes that the citizenship of a non-named limited partnership may be based on its "nexus" to the state in which the lawsuit is filed, as opposed to the citizenship of its partners. *Id.* at 16a. The decision thus transforms a basic jurisdictional determination into a free-wheeling, fact-intensive inquiry that considers the existence of non-named entities such as partnerships that might have a connection to a named defendant or the events at issue, and then gauges the "nexus" among any such affiliated entities, the parties named in the complaint, and the forum state. For businesses that operate in multiple states through various affiliates, the Fourth Circuit's decision is a recipe for uncertainty and wasteful litigation over a threshold jurisdictional determination made in thousands of cases each year—in the Fourth Circuit alone.

Amici have a direct and substantial interest in the proper resolution of the important jurisdictional issues presented by this case. Amici are The Real Estate Roundtable, National Multi Housing Council, American Hotel & Lodging Association, American Resort Development Association, Building Owners and Managers Association, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Association of Homebuilders, National Association of Industrial and Office Properties, National Association of Real Estate Investment Trusts, and National Association of Realtors. Lincoln is a member of the National Multi Housing Council and the

International Council of Shopping Centers. A description of the mission, organization, and activities of each of the amici associations is set forth in the addendum to this brief.

Amici represent a broad spectrum of commercial and residential real estate interests present in virtually every county in America. Amici's members include owners and lessors of commercial property such as office buildings, shopping centers, apartments, industrial and distribution facilities, hotels, and resorts. Their members also include developers, property managers, brokers, homebuilders, Realtors, Real Estate Investment Trusts, financial institutions, investment advisors, and individual and institutional investors. Amici's members routinely operate through separate legal entities including subsidiaries, trusts, partnerships, and limited liability companies in owning properties, conducting operations, and providing specific real estate services with respect to multiple properties in different states. The multi-faceted structure of such enterprises is based on legitimate business considerations discussed below, and reflects the practical challenges of doing business in the real estate industry.

The Fourth Circuit's decision is not only legally unfounded, but creates the potential for enormous uncertainty for amici's members with respect to a crucial jurisdictional determination. Even when, as here, a plaintiff has named as a defendant a business entity that is undeniably diverse, the Fourth Circuit's decision may require a court to question the existence of diversity jurisdiction and require the defendant to *disprove* a connection between non-named affiliates and the events at issue or the forum state. In addition, the Fourth Circuit's decision creates uncertainty as to the citizenship of partnerships and other entities—through which amici's members routinely operate—for purposes of establishing diversity by holding that citizenship may be based on a partnership's purported "nexus" (Pet. App. 16a) to a state rather than the citizenship of its partners. The Fourth Circuit's analysis will increase the costs of removing such suits

to federal court by generating collateral litigation over a threshold jurisdictional determination. Moreover, the Fourth Circuit's decision will create business and investment uncertainty to the extent that it deprives businesses of their statutory right to remove a case to federal court.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision holds that, in determining citizenship for purposes of diversity jurisdiction, a court should look beyond the citizenship of a defendant named in the complaint and impose on the defendant a burden to prove that the citizenship of affiliates *not* named in the complaint does not destroy diversity under a factbound and indeterminate "real party in interest" analysis. Applying that analysis, the Fourth Circuit reversed an extensively litigated judgment for petitioners on the merits and ordered that the case be sent back to state court to begin anew. The court did so on the ground that one of Lincoln's affiliates—a limited partnership that was not named as a defendant in the original complaint, joined in an amended complaint, or deemed a necessary and indispensable party—was "probably" a "real party in interest," and that the affiliate would destroy diversity based on its purported "nexus" to Virginia. Pet. App. 15a, 16a. That jurisdictional analysis is fundamentally flawed.

In the jurisdiction context, the "real party" concept was designed to inquire into the citizenship or legitimacy of the parties before the court and ensures that the named parties have a genuine stake in the case and thus may be counted in determining diversity. *See Carden* v. *Arkoma Assoc.*, 494 U.S. 185, 188 n.1 (1990); *Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 460-461 (1980). The Fourth Circuit's decision dramatically expands that concept by employing it to look *beyond* the parties named in the complaint and then obligating a defendant to establish that other entities are *not* a "real party in interest," even though the plaintiff has not named such entities in its complaint or argued that they were necessary and indispensable under Fed. R. Civ. P. 19. The Fourth Circuit's free-ranging "real party in interest" inquiry contravenes the terms of the removal statute, which explicitly place the focus on the citizenship of the "parties in interest *properly joined and served* as defendants," 28 U.S.C. § 1441(b) (emphasis added); departs from this Court's own precedents, which establish a " 'real *party to the controversy*' test," *Carden*, 494 U.S. at 188 n.1 (emphasis added); and ignores the time-honored rule that the plaintiff is "master of the complaint," *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 398-399 (1987). In short, with no justification, the Fourth Circuit has turned the settled diversity of citizenship analysis into a formula for uncertainty and—particularly for entities that operate in multiple states through various affiliates—an engine for destroying diversity jurisdiction.

The Fourth Circuit's other conclusion is equally problematic from the standpoint of the plethora of multi-faceted business enterprises prevalent in today's economy—and just as misguided as a matter of law. As this Court recently reaffirmed, the "accepted rule" is that a partnership "is a citizen of each state * * * of which any of its partners is a citizen." *Grupo Dataflux* v. *Atlas Global Group LP*, 124 S. Ct. 1920, 1923 (2004). The Fourth Circuit, however, concluded that a partnership may be a citizen of a state for purposes of diversity jurisdiction if it has "a very close nexus" to a state, even if none of its partners is a citizen of that state. Pet. App. 16a. That kind of inquiry may be appropriate in determining whether a court has *personal* jurisdiction with respect to a partnership, but it has no place in the calculation whether *diversity* jurisdiction exists. The Fourth Circuit's decision throws into potential disarray the citizenship of hundreds, if not thousands, of partnerships that operate or own property in the Fourth Circuit. Even if the Court concludes that the Fourth Circuit erred in looking beyond the defendants named in the complaint, the Court

should reaffirm that the citizenship of a partnership is based on the citizenship of its partners, not a "nexus" test.

Clear jurisdictional rules are vitally important for the proper functioning of the federal courts and the reliance interests of thousands of American businesses, including those in the real estate industry. The Fourth Circuit's unprincipled and unwieldy jurisdictional ruling should be reversed.

ARGUMENT

I. IN THE REAL ESTATE INDUSTRY, BUSINESSES ROUTINELY OPERATE IN MULTIPLE STATES THROUGH AFFILIATED ENTITIES

The jurisdictional issues presented by this case arise because of the corporate structure employed by Lincoln—the lead defendant named in the complaint. In the real estate industry, businesses such as Lincoln often choose to operate in multiple states through affiliated entities for widely accepted business considerations, including to limit their liability and to bring local investors and special service providers into a real estate venture or project. The Fourth Circuit not only failed to appreciate the appropriate reasons for doing business through such affiliates, but appeared to fault Lincoln for choosing to operate in that fashion. A proper understanding of the real estate industry is essential to the correct resolution of the jurisdictional issues presented.

1. There are thousands of businesses in the real estate industry across the county. Many of those businesses comprise separate affiliated entities that, in turn, provide real estate-related services or own property in multiple states. It is not uncommon for such enterprises to have complex structures, such as Lincoln's, with numerous legal entities. *See* Pet. App. 96a (chart of Lincoln-related entities). The Fourth Circuit observed that it found "the manner in which Lincoln conducts business (using many different structures)" to be "confusi[ng]." *Id.* at 16a n.16; *see id.* at 13a n.11. What is more, the court appeared to fault Lincoln for its

decision to do business through different entities. *See id.* at 14a ("[T]he citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises"). There is, however, nothing unusual or improper about Lincoln's multi-faceted business structure.

Real estate companies routinely do business in multiple states through separate entities created for particular properties, projects, or services. These subsidiaries, partnerships, and limited liability companies are created to be separate from a parent entity and from each other. It is critical that courts respect each entity's separate legal existence. That is just as true when it comes to determining citizenship for purposes of diversity jurisdiction as it is in making other legal determinations as to such entities. *Cf. United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.") (citation omitted); *Prudential Oil Corp.* v. *Phillips Petroleum Co.*, 546 F.2d 469, 475 (2d Cir. 1976) ("an intercorporate assignment between a parent and its subsidiary should be treated as presumptively ineffective for jurisdictional purposes") (citing *Lehigh Mining & Mfg.* v. *Kelly*, 160 U.S. 327 (1895)).

2. It is standard practice in the real estate industry for parent companies to create separate legal entities to own, lease, finance, manage, construct, or develop a single property. This entity is often referred to as a Special Purpose Entity, or SPE, and its "special purpose" is to own, lease, finance, manage, construct, or develop the single asset it holds. An SPE is also often created to undertake one specific service, such as property management, with respect to a number of properties owned by others, including other SPEs.

With respect to a site-specific SPE, the property may be a tract of single-family homes, an apartment complex, an office

park, a shopping mall, or a resort. The SPE is an entity that has no debts or obligations other than those related to that single property. A site-specific SPE conducts no business that does not relate to the specific property—it does not guarantee or assume the debts of any other person or entity, it does not co-mingle funds with those of any other person or entity, and it holds itself out as being a separate legal entity from any other person or entity. *See generally* Steven G. Horowitz and Kimberly B. Blacklow, *Use of Single Member Limited Liability Companies in Real Estate Finance Transactions*, Practicing Law Institute, 501 PLI/Real 157 (2004).

By way of example, consider a hypothetical parent corporation that desires to invest in 50 properties, one in each state across the country, and assume that these properties include urban office buildings, suburban office parks, urban apartment buildings, suburban retail shopping centers, and industrial facilities. The parent entity is likely to set up a separate business entity—for example, a partnership or limited liability company—for each of the individual properties. The precise structure chosen for each separate business entity will be based on the type of investment being made by the parent corporation and by any additional investors in the venture. The partnership structure gives the parties the flexibility to share in the economics of the transaction based on considerations such as capital contributed, risk tolerance, and expected yield. Although the parent will be affiliated with each of these entities in some fashion, none of the properties will be held directly by the parent and each of the affiliates will therefore have a separate legal existence.

Real estate businesses also provide services to different properties throughout the country through different partnerships, limited liabilities companies, or other entities. For example, a parent corporation with multiple properties owned by separate SPEs might form a number of partnerships with local service providers to offer services such as property management (*i.e.*, maintenance, cleaning, concierge, security,

parking), property development (*i.e.*, obtaining entitlements and permits, and designing the property), construction (*i.e.*, new construction or renovations), or structured financing (*i.e.*, loaning funds directly or arranging loans with banks and other lenders). Sometimes parent companies will venture together with other businesses that provide such real estate services and form SPEs for such a purpose.

3. There are four primary reasons for creating separate legal entities to invest in separate properties or undertake services with respect to multiple properties: financing, flexibility in structure, limitation of liability, and taxation.

Financing. Nearly all commercial real estate transactions, like nearly all residential real estate transactions, involve borrowing money from an institutional lender. Today's lenders typically require a business entity that owns or is developing a property to be an SPE with no assets or operations other than the particular project securing the loan. By requiring that the property be held by an SPE, the institutional lender is better able to assess the risks involved in making the loan and better able to ensure that the loan's performance will be impacted solely by the quality and operation of the mortgaged property, not other factors.[2]

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[2] Commercial mortgages are increasingly bundled together and sold as commercial mortgage-backed securities in a national market to private investors. The credit rating for such securitized loans is based primarily, if not solely, on the property involved, not the creditworthiness of the borrowers. *See* Kathleen O. McKune, *Special Purpose Entities—Who, What, Why, Where, When, and How?*, Practical Real Estate Lawyer, 20 No. 6 Prac. Real Estate Law 7 (2004); *Legal Criteria for U.S. Structured Finance Transactions*, Standard & Poor's, ch.3 (2004). Moreover, some lenders will make commercial mortgaged-backed loans only if the property owner agrees to limit its obligations to the single property. *See* Alvin L. Arnold and Marshall Tract, *Construction & Development Financing* § 5:45.50 (3d ed. 2004).

An institutional lender providing financing for a suburban retail shopping center can underwrite the loan by analyzing the risks of financing that specific shopping center—including the likely business viability, revenue, operating costs, and value—based on the geographic location and the particular sector of the real estate market involved. But it is more difficult for the lender to analyze and predict the risk of the loan if it must attempt to evaluate the potential performance of 49 other properties spread across multiple urban and suburban landscapes and varied sectors of the real estate market.

Institutional lenders also prefer individual properties held in isolation from other properties to protect themselves from the potential bankruptcy of any business organization affiliated with the borrower. They do not want the poor performance of any other property owned by the borrower, its sponsors, or its affiliates to jeopardize their loan. In other words, institutional lenders require that the property they are financing be isolated from any other debts or obligations related to any other asset. A lender that is financing the development of an apartment complex in midtown Atlanta, or construction of a tract of single-family homes in suburban Denver, for example, might require that its financing not be used toward the management of an office building in Manhattan or land speculation in California's Central Valley. By requiring use of an SPE, banks can insulate their loan from dependence on the success or failure of other properties.[3]

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[3] The concept of structurally isolating the legal ownership of an asset through an SPE is known as being "bankruptcy-remote" and protects lenders against "substantive consolidation," a judge-made doctrine that allows the bankruptcy court to treat multiple entities as a single debtor. *See generally* Richard D. Jones and Richard A. Bendit, *Practical Advice on the Preparation of the Substantive Non-Consolidation Opinion in Real Estate Transactions*, American Law Institute, SHO96 ALI-ABA 469 (2003).

Flexibility. Utilizing an SPE for each individual property provides real estate businesses with needed flexibility. A real estate company is rarely the only entity involved in a real estate venture; rather, it partners with different investors on a property-by-property or group-of-properties basis. Sometimes the real estate business will need a financial partner, such as a pension fund, foundation, endowment, individual investor, or investment fund. Other times the real estate business will need to partner with a local contractor or a special service provider like a golf course developer.

These partners, whether financial investors, local contractors, or special service providers, insist on having an interest in only one specific property—the one with which they are involved. Holding the property in an SPE is the industry-accepted way to provide these venture partners with an ownership interest that reflects their investment. For example, a financial partner who contributes 25 percent of the equity required to build an office park in suburban Chicago wants that office park held in a legal structure that accurately reflects his interest and is isolated from other ventures undertaken by the developer. And, likewise, a golf course developer partnering with a homebuilder to incorporate a golf course into a retirement community in western North Carolina wants the property held by a legal structure that reflects the parties' interests with respect to that venture alone. If the property were held by the parent entity, along with all the other properties in which neither the office park investor nor the golf course developer has any interest, the structure would fail to reflect the actual contribution of these specific partners and would increase the risks of their investment.

Limitation of Liability. Real estate entities also use SPEs to limit liability to that business entity's assets. The investor described above who is willing to invest in a suburban office park in one state wants to avoid any potential liability for a tenant dispute or property damage claim in a retail shopping center in another state with which the investor has no in-

volvement, contributed no investment, and analyzed no risks. By creating SPEs that hold single assets, the parent and its transaction partners or affiliates may avoid the risk of preexisting liabilities and insulate each property from liability problems involving other property. Real estate investors are particularly concerned about potential uninsured property liabilities such as tenant failures or environmental hazards. In addition, by creating SPEs to perform specific services, a parent company and its partners may limit their exposure from liability that may arise from other real estate operations.

Taxation. Nearly all states impose taxes for carrying on or doing business in that state. If all 50 of the properties in the hypothetical example above were held together by one corporation or one unincorporated entity, each state could make its own calculation of the proper allotment of net income from all 50 properties to that state—rather than taxing precisely the business that was done in that state. *See, e.g., Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 335 (1939) (state tax for privilege of doing business in state can be based on net income and is not limited to income from business within that state); *Reuters Ltd.* v. *Tax Appeals Tribunal*, 623 N.E.2d 1145, 1147 (N.Y. 1993) (international corporation doing business in 80 countries required to pay New York corporate franchise tax based on apportionment of worldwide net income), *cert. denied*, 512 U.S. 1235 (1994). By using separate business entities to conduct and carry on business in separate states, real estate companies may simplify their tax assessment administration and, at the same time, more fairly and accurately allocate their tax liability.

The successful functioning of the real estate industry—a critical sector of the United States economy—depends in large measure on giving effect to these separate business structures, which may take a variety of forms that include the elements discussed above. Moreover, the proper functioning of the real estate market is key to the growth and stability of financial markets that provide mortgage loans, real-estate

backed securities, and investment capital. The Fourth Circuit overlooked these important considerations, faulted Lincoln for operating in an industry-accepted fashion, and created a jurisdictional rule that is likely to upset this vital market.

II. THE FOURTH CIRCUIT'S DECISION INVITES JURISDICTIONAL DISORDER FOR BUSINESSES THAT OPERATE THROUGH AFFILIATED ENTITIES IN MULTIPLE STATES

Clarity is a matter " 'of first importance' " (*Navarro*, 446 U.S. at 464 n.13) (citation omitted) in fashioning basic jurisdictional rules. The Fourth Circuit's decision throws into disarray the settled framework for determining diversity of citizenship. If it is allowed to stand, it will generate uncertainty for the hundreds, if not thousands, of real estate firms that operate in multiple states through affiliated entities concerning the fundamental question whether diversity jurisdiction exists and the related—and equally important—question whether a case is removable to federal court. The confusion that that is likely to be generated by the Fourth Circuit's analysis is reason alone to reject that analysis.

1. As this Court recently emphasized, "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux*, 124 S. Ct. at 1930; *see also Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (jurisdictional rules should not depend on fact-specific inquires that are "hard to apply, jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal"); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion) (jurisdictional rules have long been designed "to avoid * * * uncertainty and litigation over the preliminary issue of the forum's competence"); *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring). The Fourth Circuit's decision creates uncertainty over a basic jurisdictional determination

undertaken by federal courts thousands of times each year. Such uncertainty leads to business risks which create new costs. Lenders, investors, and other market participants in the real estate industry accordingly abhor unnecessary risks.

2. The stark contrast between the district court's diversity analysis and the Fourth Circuit's analysis underscores the uncertainty that is likely to be fostered by the decision below. The district court's jurisdictional inquiry was clear and straightforward. It looked to the complaint and determined the citizenship of the defendants that respondents—Virginia citizens—had chosen to sue. *See* Pet. App. 84a-85a, 87a-88a, 92a-93a. Respondents sued (1) Lincoln, which is indisputably a Texas citizen, because it is a Texas corporation with its principal place of business in Texas, *see Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. 497, 558 (1844); 28 U.S.C. § 1332(c)(1) (citizenship of corporation is the place of incorporation and its principal place of business); and (2) SWIB, a Wisconsin entity. Based on the citizenship of Lincoln and SWIB—*i.e.*, the named defendants—diversity of citizenship undeniably exists. Those defendants, moreover, have a direct interest in this case. *See* Pet. 11.[4]

By contrast, the Fourth Circuit held that "the citizenship of the nominal parties listed on the Complaint is in *no way* dispositive of subject matter jurisdiction." Pet. App. 17a (emphasis added). Thus, although the Fourth Circuit did not

[4] In addressing respondents' post-judgment motion for remand, the district court also considered the citizenship of one of Lincoln's affiliates, EQR/Lincoln Limited Partnership (EQR). The district court found that EQR is a citizen of Texas, because its partners are citizens of Texas. *See* Pet. App. 87a-88a, 92a-93a; *Carden*, 494 U.S. at 192-193, discussed *infra*. The district court did not hold that it was *necessary* to consider the citizenship of EQR in determining whether diversity jurisdiction exists. But rather in disposing of respondents' motion, the court simply explained that jurisdiction would exist "even assuming" that EQR had been named as a defendant. Pet. App. 88a.

question that diversity exists with respect to the parties named in the complaint, the court held that it was necessary to look beyond the defendants named in the complaint and to ascertain the citizenship of any purported "real parties in interest." *Id.* at 14a. In applying that analysis, the court attempted to canvass Lincoln's business affiliates and ascertain how they were related to the action. *Id.* at 11a-14a. The court openly acknowledged that it had difficulty in understanding Lincoln's business structure and described it as "confusing." *Id.* at 14a; *see id.* at 13a n.11.

The Fourth Circuit focused on EQR/Lincoln Limited Partnership (EQR), which was not named as a defendant, though it speculated that there may also be other non-named entities that could destroy diversity. Pet. App. 15a-16a. EQR is a Lincoln affiliate that manages the property underlying petitioners' claim. As the district court explained, EQR was formed in Delaware and is a Texas citizen for purposes of determining diversity jurisdiction because its partners are Texas citizens. *Id.* at 87a-88a; *see* note 4, *supra*. The Fourth Circuit acknowledged that EQR's listed partners are Texas citizens and that the record does not establish that any EQR partner is a citizen of Virginia. Pet. App. 12a-13a. Nonetheless, the court held that EQR was probably a "real and substantial party in interest" based on EQR's activities in managing the apartment complex where respondents lived; that EQR effectively must be regarded as a citizen of Virginia because it "owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth"; that EQR would destroy "complete diversity" if the action had been "maintained" against it or if EQR had been "joined"; and that the case therefore "should be remanded" to state court. *Id.* at 16a-17a.

3. The Fourth Circuit's jurisdictional analysis is the antithesis of a clear and predictable rule. Under the Fourth Circuit's analysis, a business defendant with multiple affiliates cannot be assured that the citizenship determination will

be based on its own legal citizenship. Instead, the defendant may be asked to prove that one of its affiliates is *not* a real party in interest to the case, even though the affiliate was not named as a defendant. That "real party in interest" inquiry is inherently fact-bound and indeterminate. For example, in this case, the Fourth Circuit demanded "evidence" concerning whether, or to what extent, non-named affiliates "are distinct or uninvolved" in the "business enterprises" of the named defendant and "property holdings." Pet. App. 11a. The Fourth Circuit's analysis also obligates federal judges to unravel complex business structures that go beyond the parties before the court. The upshot is that a business defendant may not predict with any certainty whether it will be able to establish diversity, and thus will not be able to predict whether a case is removable from state court to federal court. In addition, federal courts will be required to make potentially complex factual determinations just to determine whether a case is removable in the first place.

Furthermore, the Fourth Circuit's analysis of the citizenship of EQR—the non-named affiliate that the court deemed to probably be "the real party in interest"—will generate uncertainty as to the citizenship of partnerships for diversity purposes. As explained below, the "accepted rule" is that a limited partnership (or partnership) "is a citizen of each state or foreign country of which any of its partners is a citizen." *Grupo Dataflux*, 124 S. Ct. at 1923 (citing *Carden*, 494 U.S. at 192-195). The Fourth Circuit, however, did not base its determination that EQR destroyed diversity on the citizenship of EQR's partners (which are Texas citizens, *see* note 4, *supra*), but rather on the notion that EQR has "a very close nexus with the Commonwealth, which is much stronger than any nexus to Texas made apparent by the record." Pet. App. 16a. That "nexus" analysis creates great uncertainty for partnerships—many of which are engaged in the real estate business—because they can no longer assume that they can establish diversity based on the citizenship of their partners

and, instead, are left to guess as to whether a court will find that their purported "nexus" with a particular state is sufficient to destroy (or support) diversity jurisdiction.

4. The uncertainty created by the Fourth Circuit analysis will generate "wasteful" (*Grupo Dataflux*, 124 S. Ct. at 1929) litigation. In this case, for example, respondents sued Lincoln because its trade name was used in connection with the management of the property underlying the suit. Pet. 11. Lincoln answered the complaint fully prepared to satisfy any award against it, removed the case to federal court based on the diversity of the parties named in the complaint, and litigated the case to a judgment in its favor. Yet, on appeal, the federal courts determined—for the first time—that a non-named affiliate of Lincoln was a "real party in interest," and that the affiliate was a citizen of Virginia based on its "nexus" to the state. Even though the plaintiffs had not named the affiliate as a defendant, or even attempted to join the affiliate as a party, the Fourth Circuit reversed the judgment in respondents' favor and ordered that the case be remanded to state court for the litigation to begin over again.

Neither the federal courts nor litigants (whether plaintiffs or defendants) are well-served by such a haphazard and duplicative approach to such a threshold jurisdictional determination. As this Court has already recognized, "[j]urisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." *Navarro*, 446 U.S. at 464 n.13 (quoting David Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. Chi. L. Rev. 1 (1968)). Accordingly, the "policy goal" is to "minimize[e] litigation over jurisdiction," *Grupo Dataflux*, 124 S. Ct. 1929, not to *foster* it. The litigation and uncertainty that is almost certain to be generated by the Fourth Circuit's decision counsels strongly, if not decisively, against adopting that analysis.

III. THE FOURTH CIRCUIT'S JURISDICTIONAL ANALYSIS IS FUNDAMENTALLY FLAWED

In concluding that diversity jurisdiction is lacking, the Fourth Circuit committed two fundamental errors. First, the court looked *beyond* the citizenship of the parties named in the complaint for non-named affiliates that might destroy diversity under a "real parties in interest" analysis. Pet. App. 14a. Second, the court concluded that the citizenship of a non-named limited partnership may be based solely on its factual "nexus" to the state in which the lawsuit was filed. *Id.* at 16a. Each of those errors requires reversal.

1.a. The overriding question in this case is whether Congress has conferred subject matter jurisdiction over respondents' action. Section 1332(a)(1) of title 28 grants federal jurisdiction over certain controversies between "citizens of different States." *See also* U.S. Const. art. III, § 2. Jurisdiction is not conferred unless there is "complete diversity" among all plaintiffs and defendants. *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The removal statute provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"—including diversity jurisdiction—"may be removed by the defendant" to federal district court. 28 U.S.C. § 1441(a). The statute further provides that diversity cases "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b).

In determining whether complete diversity—and therefore federal diversity jurisdiction—exists, this Court has held "that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Navarro*, 446 U.S. at 460. Thus, federal courts have long applied a "'real party to the controversy' test" to determine "which of various parties *before the Court* should be considered for purposes of determining whether there is complete diversity of citizenship." *Carden*, 494 U.S. at 188

n.1 (emphasis added); *see id.* at 200 ("[O]ne of the benchmarks for determining whether a particular party *among those involved in the litigation* must be counted for purposes of diversity jurisdiction has been whether the party has a 'real interest' in the suit or, in other words, is a 'real party' to the controversy.") (O'Connor, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis added).

Rule 17(a) of the Federal Rules of Civil Procedure embodies that line of decisions and provides that "[e]very action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). Rule 17(a) further specifies that certain individuals, such as a "trustee of an express trust," "may sue in the person's own name without joining the party for whose benefit the action is brought." *Ibid.* Although the two inquiries are not identical, this Court has observed that "[t]here is a 'rough symmetry' between the "real party in interest" standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of the real parties to the controversy." *Navarro*, 446 U.S. at 463 n.9.

The "'real party to the controversy' test" (*Carden*, 494 U.S. at 188 n.1) has been most commonly applied in the case of plaintiffs, *i.e.*, the situation addressed by Rule 17(a). In determining plaintiffs' citizenship, federal courts look to whether the party bringing the action has a real and substantial interest in the case or is instead merely a nominal party suing on another's behalf. *See, e.g., Navarro*, 446 U.S. at 465-466; *Coal Co.* v. *Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1871); *McNutt* v. *Bland*, 43 U.S. (2 How.) 9 (1844). Likewise, courts will prevent a nominal or fraudulently joined co-plaintiff from destroying complete diversity by disregarding that party in determining diversity of citizenship. *See, e.g., Iowa Public Serv. Co.* v. *Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977) ("[I]f the 'nondiverse' plaintiff is not a real party in interest, and is purely a formal or nominal party, his or its presence in the case may be ignored in determining jurisdiction."); 14B Charles Alan Wright *et al.*,

Federal Practice and Procedure § 3723 (3d ed. 1998) ("[I]t is well-settled that the district court will not allow removal jurisdiction to be defeated by the plaintiff's destruction of complete diversity of citizenship by the collusive or improper joinder of parties or the assignment of claims.").

Likewise, with respect to defendants, the "real party to the controversy" test prevents a plaintiff from defeating diversity or removal jurisdiction by naming a non-diverse defendant with no real interest in the case. If a named defendant lacks any real and substantial interest in the controversy, a court should ignore that defendant's citizenship and only examine the citizenship of other named defendants in determining whether complete diversity exists. *See, e.g.*, *Wood* v. *Davis*, 59 U.S. (18 How.) 467, 469 (1856) ("It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction."); *Wilson* v. *Oswego, TP*, 151 U.S. 56, 62-65 (1882) (considering whether certain named defendants were "purely formal and unnecessary parties" whose citizenship should be ignored). Similarly, jurisdiction may not be "defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *see also Wormley* v. *Wormley*, 21 U.S. (8 Wheat.) 421, 451 (1823). The "real party to the controversy" test thus ensures that the diversity calculation is based only on those parties involved in the action that have a real interest in the action.

b. Here, the Fourth Circuit did not dispute that complete diversity exists among the parties before the court: respondents (from Virginia), Lincoln (from Texas), and SWIB (from Wisconsin). Nor did the court dispute that the named parties—including Lincoln, which showed up to defend against this action and secured a judgment in its favor after extensive litigation—were proper parties. Instead, in determining whether diversity jurisdiction exists, the court looked

beyond the parties named in the complaint; concluded that a separate affiliate of Lincoln—not named in the complaint—"probably" was a real party in interest, Pet. App. 15a; concluded that "*both*" Lincoln and the separate entity "should be parties," *id.* at 16a (emphasis added); and held that complete diversity is lacking on the ground that the non-named affiliate was a citizen of the same state as respondents. For several reasons, that analysis is fundamentally flawed.

First, the Fourth Circuit's analysis contravenes the terms of the removal statute, which governs diversity actions, such as this case, that are initially filed in state court. As noted, the removal statute specifies that a civil action brought in state court may be removed by a defendant on the basis of diversity jurisdiction "only if none of the parties in interest *properly joined and served as defendants* is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (emphasis added).[5] According to the plain language of the statute, the only parties whose citizenship is relevant for purposes of considering whether jurisdiction exists are those who were "properly joined and served as defendants"—here, Lincoln and SWIB. Nothing in the removal statute authorizes a federal court to look *beyond* the parties "properly joined and served as defendants" to defeat removal on the basis of the citizenship of entities *not* named in the complaint or parties to the case. Furthermore, the language that Congress used in the removal statute is consistent with a proper understanding of this Court's "real party to the controversy" case law, which, as discussed next, focuses the citizenship inquiry on the parties before the court.

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[5] The removal statute also provides that, "[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(a). The focus on the "defendants sued" in Section 1441(a) squares with Congress's focus in Section 1441(b) on only those defendants "properly joined and served as defendants."

Second, the Fourth Circuit's decision is based on a misapplication of this Court's precedents. As discussed above, in applying the "real party to the controversy" test, this Court has focused on "which of various parties *before the Court* should be considered for purposes of determining whether there is complete diversity of citizenship." *Carden*, 494 U.S. at 188 n.1 (emphasis added). After all, it is a " 'real *party to the controversy*' test." *Ibid.* (emphasis added). For example, the Court has looked to whether the named plaintiff has a real and substantial interest in the controversy, *see, e.g.*, *Navarro*, 446 U.S. at 465, or whether the plaintiff has joined a sham defendant in order to defeat jurisdiction, *see, e.g.*, *Wilson*, 257 U.S. at 97. In this case, by contrast, the Fourth Circuit looked outside of the parties named in the complaint and held that complete diversity was destroyed by a separate entity that was *not* named in the complaint. We are not aware of any case in which this Court has applied the "real party to the controversy" test to destroy diversity jurisdiction by invoking the citizenship of a non-named, *potential* defendant.

To the contrary, this Court has recognized that the presence of *potential* defendants that might have a real interest in the case if named or joined does not destroy the diversity jurisdiction that exists with respect to the parties before the court. *See, e.g.*, *Lumbermen's Mut. Cas. Co.* v. *Elbert*, 348 U.S. 48 (1954). In *Elbert*, this Court held that diversity jurisdiction existed where a Louisianan who had been injured in a car accident brought suit directly against the Illinois insurer of the driver of the car, another Louisianan. The Court recognized that both the injured plaintiff and the insurer defendant were real parties in interest, and that diversity existed between those parties. The fact that the tortfeasor/insured—who was not named in the complaint—also had a real interest in the controversy did not destroy diversity jurisdiction between the actual parties in the case. *Id.* at 51-52.

Nothing in this Court's decision in *Navarro*, on which the court of appeals relied (Pet. App. 3a-4a), supports the conclu-

sion that a court is obligated to look beyond the defendants named in a complaint to determine whether there are any real parties in interest that, if joined, would destroy diversity jurisdiction. Rather, as this Court recently emphasized in *Carden*, 494 U.S. at 191, the Court in *Navarro* examined whether the named *plaintiffs* who brought the lawsuit—*i.e.*, the individual trustees of a business trust—were the "real parties to the controversy." *Navarro*, 446 U.S. at 460-461. The Court's decision answering that question in the affirmative in no way supports the Fourth Circuit's conclusion that it was obligated to look outside of the complaint for potential *defendants* that, if joined, would destroy diversity.

Third, the Fourth Circuit's analysis is inconsistent with the time-honored rule that the plaintiff is the "master of the complaint." *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). As "master of the complaint," a plaintiff not only may "eschew[] claims based on federal law * * * to have the cause heard in state court," *ibid.* (quoting *Caterpillar Inc.*, 482 U.S. at 398-399), but also may forego litigation or claims against potential defendants with a real and substantial interest in the case, *see Lumbermen's Mutual Casualty Co.*, 348 U.S. 48 (permitting plaintiff to sue diverse insurer in federal court by not naming non-diverse tortfeasor). Indeed, plaintiffs routinely choose to forego litigation against potential defendants for strategic reasons or other considerations. In addition, plaintiffs may seek to join additional defendants when new facts come to light during the course of litigation. *See* Fed. R. Civ. P. 20.

Respondents—the plaintiffs in this case—chose to name only two defendants: Lincoln and SWIB. Pet. App. 85a. It is undisputed that those parties are citizens of different states than respondents, and that complete jurisdiction therefore exists among the parties before the court. The Fourth Circuit speculated that another entity—"probably" EQR—was a citizen of Virginia and has an interest in this case. Pet. App. 15a-16a. However, respondents—the master of their com-

plaint—chose not to name, join, or serve EQR. The Fourth Circuit's reliance on its own speculation to find a lack of complete diversity exceeded the scope of the court's authority; the court found a lack of complete diversity based on the theoretical citizenship of an entity that is not a defendant and may or may not have an interest in the litigation.

Even if a non-diverse, putative defendant exists, courts "regularly exercise diversity jurisdiction in cases where nondiverse individuals or groups who are not direct parties to the litigation nevertheless have a crucial interest in its outcome." *E.R. Squibb & Sons, Inc.* v. *Accident & Cas. Ins. Co.*, 160 F.3d 925, 936 (2d Cir. 1998). For purposes of determining whether diversity of citizenship exists, the focus must be on the parties that the plaintiff has chosen to name.

Fourth, the Fourth Circuit's jurisdictional analysis also unnecessarily intrudes on the province of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 carves out a narrow circumstance in which federal courts *do* have authority to consider the existence of non-named entities whom the plaintiff could have—but chose not to—name in an action. Under Rule 19(a), if a court concludes that a plaintiff has failed to join a necessary party, the court may order the joinder of that party. Rule 19(a) does not apply if joinder would "deprive the court of jurisdiction over the subject matter of the action," Fed. R. Civ. Proc. 19(a), such as where jurisdiction is founded on diversity and the necessary party would destroy diversity. Under Rule 19(b), however, if the court concludes that a missing person that may not be made a party under Rule 19(a) is "indispensable," the court may order that the case be dismissed. *See, e.g., Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968) (a federal court should dismiss an action under Rule 19 only if a non-named, non-diverse party is both necessary and indispensable); *National Union Fire Ins. Co.* v. *Rite Aid of S.C., Inc.*, 210 F.3d 246, 254 (4th Cir. 2000) (dismissing

case for lack of subject matter jurisdiction because non-diverse party was necessary and indispensable).

Rule 19 therefore provides an established mechanism for addressing the rare case in which diversity jurisdiction exists based on the parties named in the complaint, but the plaintiff has failed to name a necessary and indispensable party that, if joined, would destroy diversity. The Fourth Circuit below acknowledged Rule 19, but did not conclude that EQR or any other non-named entity or affiliate of Lincoln was a necessary and indispensable party. *See* Pet. App. 7a n.5. Indeed, the Fourth Circuit did not engage in any formal Rule 19 analysis in this case, and there is no reason to conclude that EQR would qualify as a necessary and indispensable party under Rule 19. Instead, the Fourth Circuit applied a watered down—and inappropriate—quasi-Rule 19 inquiry in holding that diversity jurisdiction was lacking, and that the case should be dismissed, based on its conclusion that a non-named entity was a real party in interest. *See* Pet. App. 16a.

Finally, the Fourth Circuit's analysis creates an unmanageable and inefficient regime. Federal courts are obligated continuously to ensure that subject matter jurisdiction exists in the cases before them. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 230-231 (1990); *see also* Pet. App. 7a; 28 U.S.C. § 1447(c). Especially in complex litigation involving sophisticated business entities, the Fourth Circuit's rule creates a ticking time bomb that may derail a case founded on diversity jurisdiction because a party may at any juncture assert that a non-named entity is in fact a real party in interest that, if joined, would destroy diversity of citizenship, and it will be necessary for courts—including appellate courts—to keep a constant look-out for potential non-diverse affiliates of corporate defendants. Indeed, in this case, the Fourth Circuit *sua sponte* plunged into its misguided "real party in interest" analysis, even though respondents had not directly challenged on appeal the district court's ruling that removal based on diversity of citizenship was proper.

The "real party to the controversy" test is inherently fact-bound. But, as this case illustrates, the free-wheeling approach adopted by the Fourth Circuit may compel a court of appeals to engage in factual speculation about unnamed persons or entities to assure itself that diversity jurisdiction exists. By contrast, a rule that makes clear that the "real party" analysis is limited to the parties *named* in the complaint ensures that any potential jurisdictional pitfalls are identified at the outset of litigation on the basis of a straightforward analysis—before both the parties and the courts invest substantial resources in litigating the case, and in a setting in which factual development is plausible.

2. The Fourth Circuit committed another fundamental error in concluding that diversity jurisdiction was lacking. Even if this Court concludes that the Fourth Circuit properly looked beyond the named defendants to determine whether jurisdiction exists, the court of appeals erred insofar as it held that the citizenship of a non-named limited partnership may be based on its purported factual "nexus" to a state, as opposed to the citizenship of its partners.

After looking beyond the parties named in the complaint to determine whether complete diversity existed, the Fourth Circuit held that a non-named Lincoln affiliate—"probably" EQR, a limited partnership—was a real party in interest, and that the entity must be deemed a citizen of Virginia based on its allegedly "very close nexus" to the state. Pet. App. 15a, 16a. That conclusion, too, is erroneous. A corporation is a citizen of its principal place of business and its place of incorporation—regardless of where it may conduct business, or of the nexus that it might have with a state. 28 U.S.C. § 1332(c)(1). And the "accepted rule" is that a partnership is a citizen of each state of which its partners is a citizen—regardless of its activities in other states. *Grupo Dataflux*, 124 S. Ct. at 1923 (citing *Carden*, 494 U.S. at 192-195).

At least outside the Fourth Circuit, the courts of appeals that have addressed the issue have hewed to the rule that the location in which a partnership does business does not effect its citizenship for purposes of diversity. These courts have held that a partnership's business activities may not be considered in determining a partnership's citizenship. For example, in *Conntech Development Co.* v. *University of Connecticut Educational Properties, Inc.*, 102 F.3d 677 (2d Cir. 1996), the Second Circuit determined that a partnership was a citizen of New Jersey and Ohio—which is where its corporate partners were citizens—even though the partnership conducted business wholly within Connecticut. *Id.* at 681. Likewise, in *Taber Partners, I* v. *Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1993), the First Circuit held that a partnership comprised of two New York corporations, whose principal places of business were New York, was only a citizen of New York—even though the partnership's purpose was to manage property in Puerto Rico. *Id.* at 63-64.

By contrast, the Fourth Circuit held that a limited partnership may qualify as a citizen of a state if it has "a very close nexus" with the state. Pet. App. 16a. In this case, for example, the court pointed to evidence "that the property at issue is in Virginia, the mold abatement services contracted for were in Virginia by a Virginia company, Lincoln maintains several rental properties in Virginia other than the one at issue here, Lincoln has a regional office in Virginia, and all of the correspondence and communication related to this controversy occurred in Virginia." *Id.* at 15a; *see id.* at 16a (the non-named entity "owns land and operates a substantial part of its business in Virginia"). The court thus transformed the clear and predictable *Carden* rule that a partnership is a citizen of each of the states in which its partners are citizens into an indeterminate and fact-intensive "nexus" test.

Even if this Court concludes that the Fourth Circuit erred as a threshold matter in looking beyond the parties named in the complaint to determine diversity of citizenship, amici

urge this Court to make clear that the Fourth Circuit further erred in concluding that the citizenship of a partnership may be established by its nexus to a state, rather than the citizenship of its partners. As discussed above, if left undisturbed by this Court, that aspect of the Fourth Circuit's ruling could generate enormous uncertainty for the hundreds, if not thousands, of real estate partnerships that have some nexus to a state in the Fourth Circuit, but nevertheless are not a citizen of that state under the settled rule recognized in *Carden*. Accordingly, it is vital that the Court make clear that the Fourth Circuit's "nexus" analysis is unfounded as well.

IV. THE FOURTH CIRCUIT'S DECISION WILL IMPROPERLY DEPRIVE BUSINESSES OF THEIR STATUTORY REMOVAL RIGHT

The Fourth Circuit's decision creates a diversity-destroying rule that will improperly deprive business defendants of their statutory right to remove a case to federal court where diversity jurisdiction properly exists if they cannot establish diversity under the Fourth Circuit's open-ended analysis. That is all the more reason to reverse the decision below.

Diversity jurisdiction has been a fundamental component of federal court jurisdiction since the founding. *See* U.S. Const. art. III, § 2; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. It serves a vital policy objective. As this Court has explained, "the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views." *Great S. Fire Proof Hotel Co.* v. *Jones*, 193 U.S. 532, 544 (1904); *see also* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1556 (2005) ("basic purpose of diversity jurisdiction is thought to be the protection of out-of-state parties from the possible prejudice of local courts"); The Federalist No. 80, at 534 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("the national judiciary ought to preside in all cases in which one

state or its citizens are opposed to another state or its citizens" because "having no local attachments" it will be impartial and unbiased); *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (access to a "wholly impartial tribunal, namely, the federal court sitting in that state" is necessary because "consciously or otherwise, the courts of a state may favor their own citizens").

Moreover, as noted above, when a plaintiff files an action in state court over which the federal courts would have diversity jurisdiction, defendants have a statutory right to remove the action to federal court, as long as "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b); *see Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61, 68 (1996). As this Court recognized long ago, "[t]he right of choosing an impartial tribunal is a privilege of no small practical importance." *Marshall* v. *Baltimore & Ohio R.R.*, 57 U.S. 314, 329 (1853). Thousands of out-of-state defendants choose to exercise that right each year and remove state actions to federal courts in order to obtain a potentially more impartial forum. In 2003, more than 44,000 cases were removed from state court to federal court (considering all bases of jurisdiction). *Judicial Business of the United States Courts 2003*, Table S-7 (*available at* www.uscourts.gov/judbus2003/tables/s7.pdf). Out-of-state businesses, in particular, are often concerned that they may experience local prejudices by being forced to litigate in a foreign state court.

The Fourth Circuit's decision may improperly deprive out-of-state businesses of their statutory right to remove cases to federal court where diversity jurisdiction exists under a proper analysis. Indeed, in this case, Lincoln removed the action to federal court based on the diversity of citizenship among the parties named in the complaint and obtained a judgment in its favor in the district court. But the Fourth Circuit reversed that judgment and ordered that the case be sent back to state court based on the application of its mis-

guided "real party in interest" analysis. Moreover, the Fourth Circuit concluded that some Lincoln affiliate, "probably" the limited partnership EQR, was a Virginia citizen based on its purported "nexus" to Virginia, even though none of EQR's partners is a citizen of Virginia. That analysis could deprive partnerships in the real estate business of their right to remove a case to federal court in any state in which the partnership owns, leases, manages, or is developing property.

Because they operate through many entities—including partnerships—in different states, real estate businesses will be disproportionately penalized under the Fourth Circuit's rule. The decision below creates a potential diversity-destroying engine for such entities and thus may deprive businesses of their right to seek an impartial federal forum.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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ADDENDUM

DESCRIPTION OF AMICI CURIAE

American Hotel & Lodging Association. The American Hotel & Lodging Association (AH&LA) is a dual membership association of state and city partner lodging associations throughout the United States. AH&LA was established in 1911 and is based in Washington, D.C. AH&LA has some 10,000 property members nationwide, representing more than 1.4 million guest rooms. It provides members with advocacy on Capitol Hill, research and information on the lodging industry, and other services designed to ensure a positive business climate for the U.S. lodging industry.

American Resort Development Association. The American Resort Development Association (ARDA) is a Washington, D.C.-based trade association representing the vacation ownership and resort development industries. The ARDA was established in 1969 as the American Land Development Association and today has nearly 1000 members, ranging from privately held companies to major corporations, which are located and do business in the United States and overseas.

Building Owners and Managers Association. The Building Owners and Managers Association (BOMA) International is an international federation of 108 local associations. BOMA International's 19,000 members own or manage more than nine billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.

Institute of Real Estate Management. The Institute of Real Estate Management (IREM) has been the source for education, resources, information and membership for real estate management professionals for more than 70 years. IREM is an affiliate of the National Association of Realtors

and is the only professional real estate management association serving both the multi-family and commercial real estate sectors. The IREM has 82 chapters in the United States as well as eight international chapters. IREM serves as an advocate on issues affecting the real estate management industry. Membership includes nearly 16,000 individual members and 530 corporate members. Collectively, IREM's members manage more than 6.5 billion square feet of commercial space and more than 13 million residential units, totaling more than $848.2 billion in real estate assets.

International Council of Shopping Centers. The International Council of Shopping Centers (ICSC) is a global trade association representing the interests of the shopping center industry. The ICSC was founded in 1957 and has more than 50,000 members in the United States and elsewhere around the world representing owners, developers, retailers, lenders, and other professionals. Nearly 45,000 of the ICSC's members are in the United States and represent nearly all the 46,990 shopping centers in the United States.

National Association of Homebuilders. The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association representing more than 220,000 members involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing, and other aspects of residential and light commercial construction. The NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the more than 1.84 million new housing units projected for 2005, making housing one of the largest engines of economic growth in the country.

National Association of Industrial and Office Properties. The National Association of Industrial and Office Properties (NAIOP) is the nation's leading trade association

for developers, owners, investors and asset managers in industrial, office, and related commercial real estate. NAIOP was founded in 1967 and is comprised of more than 12,000 members in 50 North American chapters. It provides networking opportunities, educational programs, research on trends and innovations and strong legislative representation.

National Association of Real Estate Investment Trusts. The National Association of Real Estate Investment Trusts (NAREIT) is the national trade association for REITs and publicly traded real estate companies with a combined market capitalization of about $294 billion. Members are real estate investment trusts (REITs) and other business entities that own, operate, and finance income-producing real estate, as well as firms and individuals who advise, study, and service those businesses. NAREIT's principal mission is to communicate about REITs and real estate investment to members, policymakers nationwide, the investment community, the media, and the public. NAREIT regularly represents the REIT and real estate investment community before Congress and the Executive Branch, provides research on the REIT industry, and publishes information about REITs.

National Association of Realtors. The National Association of Realtors (NAR) is a non-profit association that represents more than one million members engaged nationwide in all phases of the real estate business, including brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. NAR's members contribute to such activities as safeguarding real property rights, promoting equal opportunity in housing, real estate licensing, neighborhood revitalization, and public service, and promoting cultural diversity.

National Multi Housing Council and the National Apartment Association. The National Multi Housing

Council and the National Apartment Association (NMHC and NAA) represent the nation's leading firms participating in the multi-family rental housing industry. The combined memberships of NHMC and NAA are engaged in all aspects of the apartment industry, including ownership, development, management, and finance. The NMHC represents the principal officers of the apartment industry's largest and most prominent firms. The NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. The NAA is the largest national federation of state and local apartment associations and is comprised of 164 affiliates and represents more than 31,505 professionals who own and manage more than five million apartments across the country. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

The Real Estate Roundtable. The Real Estate Roundtable (Roundtable) is a federal policy organization comprised of real estate industry leaders. Its members are the Chairmen, Presidents, and CEOs of the nation's 100 leading commercial and multifamily firms, and the Managing Directors of major financial institutions. The Roundtable also includes the elected leaders and executive directors of major real estate trade organizations. The Roundtable serves as the vehicle through which industry leaders come together to identify, analyze, and advocate policy positions on issues important to the national real estate community. The Roundtable's business and trade association leaders work collectively to ensure a cohesive industry voice is heard by government officials and the public about relevant real estate policies. Collectively, Roundtable members hold portfolios containing over 2.5 billion square feet of developed property valued at more than $250 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.

(7)

Supreme Court, U.S.
FILED
MAY 17 2005
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No. 04-712

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1389-A

JUANITA ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/17/02	1	NOTICE OF REMOVAL from Circuit Court of Fairfax County by Lincoln Property, Invesco, SWIB Investment; FILING FEE $150.00 RECEIPT # 100158024; jury demand by pltf; No Answer Filed (pwhi) [Entry date 09/18/02]
		* * * * *
10/3/02	9	Consent Order that this action is hereby consolidated into CA 02-1390-A. – ent. & filed. (signed by Judge Leonard D. Wexler) Copies Mailed: yes (wpin) [Entry date 10/10/02]
10/3/02	--	Consolidated Member Case. Lead Case Number: 02 CV 1390 (wpin) [Entry date 10/10/02]

10/8/02	10	MOTION by SWIB Investment, Invesco, Lincoln Property to Dismiss (wpin) [Entry date 10/10/02]
10/8/02	11	MEMORANDUM by Lincoln Property, Invesco, SWIB Investment in support of [10-1] motion by SWIB Investment, Invesco, Lincoln Property to Dismiss by SWIB Investment, Invesco, Lincoln Property (Large Pleading) (wpin) [Entry date 10/10/02] [Edit date 10/10/02]

* * * * *

10/21/02	13	Consent Order; ORDERED that Juanita Roche v. Lincoln Property Co., et. al. No. 02-1389-A is hereby closed (See order for details) (signed by Judge Gerald B. Lee) Copies Mailed: yes (pwhi) [Entry date 10/22/02]
10/21/02	--	Case closed (pwhi) [Entry date 10/22/02]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/17/02	1	NOTICE OF REMOVAL from Circuit Court of Fairfax County by Lincoln Property Co., Invesco, Swib Investment Co; FILING FEE $150.00 RECEIPT # 100158023; jury demand (wpin) [Entry date 09/18/02]

* * * * *

10/3/02	11	Consent Order that the action captioned Juanita Roche v Lincoln Property Co, et al, No. 02-1389-A is hereby consolidated in to the above action. – ent. & filed. (signed by Judge Leonard D. Wexler) Copies Mailed: yes (wpin) [Entry date 10/04/02]
10/3/02	--	Consolidated Lead Case (wpin) [Entry date 10/10/02]

* * * * *

10/8/02	13	MOTION by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (wpin) [Entry date 10/09/02]
10/8/02	14	MEMORANDUM by Lincoln Property Co., Invesco, Swib Investment Co in support of [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (Large Pleading) (wpin) [Entry date 10/09/02] [Edit date 10/10/02]

* * * * *

10/22/02	--	CASE reassigned to Judge Gerald B. Lee (per direction of CMH chambers) (pmil)

* * * * *

10/25/02	19	MEMORANDUM by Christophe Roche, Juanita Roche in opposition to [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (wpin) [Entry date 10/28/02]
10/25/02	20	MOTION by Juanita Roche, Christophe Roche for Leave to File amended complaint (wpin) [Entry date 10/28/02]
10/25/02	21	MEMORANDUM by Christophe Roche, Juanita Roche in support of [20-1] motion by Juanita Roche, Christophe Roche for Leave to File amended complaint by Juanita Roche, Christophe Roche (wpin) [Entry date 10/28/02]

* * * * *

11/7/02	23	MEMORANDUM by Lincoln Property Co., Invesco, Swib Investment Co in opposition to [20-1] motion by Juanita Roche, Christophe Roche for Leave to File amended complaint by Juanita Roche, Christophe Roche (wpin) [Entry date 11/12/02]

11/13/02	26	REPLY by Lincoln Property Co., Invesco to response to [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (clar) [Entry date 11/14/02]
11/15/02	--	Minute entry: (GBL) r: Wilson. Appearances: Counsel. Onfor hearing on deft motion to dismiss – argued and granted as to the original complaint w/leave to amend. However, the proposed Amended Complaint submitted w/Motion to Amend is not accepted and pltf may file a Second Amended Complaint w/i 20 days – deft response due w/i 20 days thereafter. Order to follow. (jsol)
11/27/02	27	MEMORANDUM ORDER for reasons stated, [20-1] motion by Juanita Roche, Christophe Roche for Leave to File amended complaint is granted w/i 20 days of this Order. The Court declines to accept the proffered Amended Complaint as pltf did not have benefit of this ruling. Deft haf 20 days thereafter to respond. [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss is granted as to the original complaint and Further Ordered that INVESCO Institutional is dismissed from this action. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 12/3/02] (jsol) [Entry date 12/03/02]
12/16/02	28	SECOND AMENDED COMPLAINT by Christophe Roche, Juanita Roche amending [28-1] amended complaint by Juanita Roche, Christophe Roche; jury demand (wpin) [Entry date 12/17/02] [Edit date 12/17/02]

* * * * *

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* * * * *

1/6/03	31	ANSWER by Lincoln Property Co. to second amended complaint (wpin) [Entry date 01/07/03]

* * * * *

1/30/03	37	MOTION by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar) [Entry date 02/03/03]
1/30/03	38	MEMORANDUM by Lincoln Property Co., Swib Investment Co in support of [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar) [Entry date 02/03/03]

* * * * *

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* * * * *

2/5/03	47	MEMORANDUM by Christophe Roche, Juanita Roche in opposition to [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar) [Entry date 02/06/03]

* * * * *

2/6/03	49	Response to rebuttal by Christophe Roche, Juanita Roche to [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar)
2/6/03	50	Rebuttal brief in support by Lincoln Property Co., Swib Investment Co of [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar)
2/7/03	--	Minute entry: Judge Sewell. Reporter: Rudgier & Green. Appearances of counsel for pltf and dft. Matter came on as dft's motion to compel discovery, dft's motion for sanctions and dft's motion to exclude Richard Bernstein, MD testimony. Matter is argued and dft's motion to compel discovery is granted, Dft's motion for sanctions is denied and dft's motion to exclude testimony of Richard Bernstein, MD is denied. Order to follow (kjon)
2/7/03	51	ORDER for the reasons stated from the bench [34-1] motion by Swib Investment Co, Lincoln Property Co. to overrule assertions of Fifth Amendment privilege and to further depose pltfs is GRANTED; Dft's motion for production of documents is GRANTED; [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. is DENIED; [34-2] motion by Swib Investment Co, Lincoln Property Co. for Rule 37(a) Sanctions is DENIED (signed by Magistrate Judge Welton C. Sewell) Copies Mailed: Yes [EOD Date: 2/10/03] (kjon) [Entry date 02/10/03]

2/7/03	52	MOTION by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint by Juanita Roche, Christophe Roche (wpin) [Entry date 02/10/03]
2/7/03	53	MEMORANDUM by Christophe Roche, Juanita Roche in support of [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint by Juanita Roche, Christophe Roche by Juanita Roche, Christophe Roche (wpin) [Entry date 02/10/03]

* * * * *

2/12/03	59	MOTION by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) (wpin) [Entry date 02/13/03]

* * * * *

2/14/03	60	MEMORANDUM by Swib Investment Co in opposition to [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint (pwhi)

* * * * *

2/14/03	64	JOINT RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [59-1] motion by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) (stas) [Entry date 02/19/03]
2/14/03	65	TRANSCRIPT for the date of 11.15.03 before GBL (motions) (agil) [Entry date 02/19/03]
2/14/03	67	MEMORANDUM by Lincoln Property Co., Swib Investment Co in opposition to [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint (clar) [Entry date 02/19/03]

* * * * *

2/19/03	68	REPLY by Christophe Roche to response to [52-1] motion by Juanita Roche, Christopher Roche to Amend [28-1] amended complaint concerning punitive damages (large pleading) (clar)
2/20/03	69	REPLY by Christophe Roche, Juanita Roche to response to [59-1] motion by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) (clar)
2/20/03	71	PROPOSED stipulated facts filed by plaintiff Christophe Roche, defendant Lincoln Property Co., defendant Swib Investment Co, plaintiff Juanita Roche (mcke) [Entry date 02/24/03]

* * * * *

2/21/03	--	Minute entry: Judge O'Grady. Reporter; Casamo and Assoc. Appearances; of counsel. Matter came on as Pltf's motion to amend amended complaint – Matter is argued and DENIED. Order to follow. (ntho) [Entry date 02/24/03] [Edit date 03/07/03]
2/21/03	--	Minute entry: (GBL) r: wilson. Appearances: Counsel. On for hearing on pltf motion to dismiss Count II re: Rule 41(a)(2) – argued and granted. Order to follow. (jsol) [Entry date 02/25/03]
2/21/03	75	Before the Court is Plaintiff's Motion for Leave to File a Second Amended Complaint. For the reasons staed [*sic*] from he bench, and in accord with specific

rulings thereto, it is hereby ordered – ORDER denying [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint by Juanita Roche, Christophe Roche (signed by Magistrate Judge Liam O'Grady) Copies Mailed: y [EOD Date: 2/26/03] (ntho) [Entry date 02/26/03]

* * * * *

3/10/03 91 ORDER for reasons stated in open court on 2/21/03, [59-1] motion by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) is granted and Further Ordered that, should pltfs re-file a claim similar to Coutn [*sic*] II, they shall bear atty fees for all parties as to that count. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 3/13/03] (jsol) [Entry date 03/13/03]

* * * * *

3/13/03 95 MOTION by Juanita Roche, Christophe Roche for Summary Judgment (Hearing set for 4/4/03) (pwhi) [Entry date 03/17/03]

3/13/03 96 MOTION by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D. and by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury (pwhi) [Entry date 03/17/03]

3/13/03 97 MEMORANDUM of Law by Lincoln Property Co., Swib Investment Co in support of [96-1] motion by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D.

and [96-2] motion by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury (Large Pleading) (pwhi) [Entry date 03/17/03]

* * * * *

3/13/03 99 MOTION by Lincoln Property Co. for Summary Judgment (pwhi) [Entry date 03/17/03]

3/13/03 100 MEMORANDUM of Law by Lincoln Property Co. in support of [99-1] motion by Lincoln Property Co. for Summary Judgment (Large Pleading) (pwhi) [Entry date 03/17/03]

* * * * *

3/24/03 110 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [95-1] motion by Juanita Roche, Christophe Roche for Summary Judgment (clar) [Entry date 03/25/03]

3/24/03 111 MEMORANDUM of Law by Christophe Roche, Juanita Roche in opposition to [99-1] motion by Lincoln Property Co. for Summary Judgment (large pleading) (clar) [Entry date 03/25/03]

3/24/03 112 MEMORANDUM of Law by Christophe Roche, Juanita Roche in support of [111-1] their opposition to defts' motion to bar testimony by Richard Bernstein, M.D. and for summary judgment on all claims for personal injury (clar) [Entry date 03/25/03]

* * * * *

3/27/03 116 Rebuttal by Christophe Roche, Juanita Roche to response to [95-1] motion by

Juanita Roche, Christophe Roche for Judgment (large pleading) (clar) [Entry date 03/28/03]

3/27/03 117 Errata sheet correcting typographical and possibley [*sic*] illegible materials contained in the exibitis filed by plaintiff Christophe Roche, plaintiff Juanita Roche in Re: [111-1] opposition to motion for summary judgment (clar) [Entry date 03/28/03]

3/28/03 118 REPLY MEMORANDUM in support by Lincoln Property Co., Swib Investment Co of [96-2] motion by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury (large pleading) (clar)

3/28/03 119 REPLY brief in support by Lincoln Property Co., Swib Investment Co of [96-1] motion by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D. (large pleading) (clar)

* * * * *

4/3/03 128 MOTION by Swib Investment Co, Lincoln Property Co. for Leave to File a Surreply to pltf's rebuttal to defts' opposition to pltf's motion for summary judgment (mcke)

4/4/03 -- Minute entry: (GBL) r: Wilson. Appearances: Counsel. On for hearing on motions for SJ – all argued and under advisement. (jsol) [Entry date 04/08/03]

* * * * *

4/16/03 139 ORDER for reasons to be stated in the forthcoming Memo Order, [96-1] motion

by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D. is granted. [96-2] motion by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury, [99-1] motion by Lincoln Property Co. for Summary Judgment is granted and [95-1] motion by Juanita Roche, Christophe Roche for Summary Judgment is denied. This case is removed from the trial docket and the statute of limitations for appeal is tolled until the Court enteres [*sic*] its forthcoming Memo Order and Judgment. This Order does not constitute a "judgment". (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 4/22/03] (jsol) [Entry date 04/22/03]

4/22/03 140 MOTION by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (clar) [Entry date 04/23/03]

* * * * *

4/22/03 142 MEMORANDUM by Christophe Roche, Juanita Roche in support of [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (large pleading) (clar) [Entry date 04/23/03]

4/30/03 143 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (clar)

4/30/03 144 Addendum filed by plaintiff Christophe Roche to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (clar)

* * * * *

5/2/03	145	BRIEF by Swib Investment Co in opposition to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (mcke)
5/2/03	146	MOTION by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (told to notice) (mcke) [Entry date 05/05/03]
5/5/03	147	SUPPLEMENTAL brief by Swib Investment Co in opposition to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (mcke)
5/6/03	148	Reply by Christophe Roche, Lincoln Property Co. to [147-1] supplemental brief opposing remand by Swib Investment Co (mcke) [Entry date 05/07/03]
5/8/03	149	OPPOSITION by Lincoln Property Co. to [146-1] motion by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (mcke)

* * * * *

5/9/03	151	REPLY by Christophe Roche, Juanita Roche to response to [146-1] motion by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (large pleading) (clar) [Entry date 05/12/03]

* * * * *

5/22/03	154	MOTION by Swib Investment Cofor Leave to File supplement brief (kjon)
5/22/03	155	SUPPLEMENTAL BRIEF by Swib Investment Co opposing [146-1] motion by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (kjon) [Entry date 05/27/03]

6/13/03	156	MOTION by Lincoln Property Co., Christophe Roche for Leave to File supplemental brief (mcke) [Entry date 06/16/03]
6/24/03	157	OPPOSITION by Lincoln Property Co., Swib Investment Co to pltfs "supplemental" motion to remand (there was no supplemental motion to remand filed) (mcke) [Entry date 06/25/03]

* * * * *

7/25/03	161	MEMORANDUM OPINION (signed by Judge Gerald B. Lee) Copies Mailed: y (agil) [Entry date 07/28/03]
7/25/03	162	ORDER, for the reasons stated in the Memorandum Opinion, that Dfts. Lincoln Property Company's and the state of Wisconsin Investment Board's, Motion to Bar the Testimony of Richard Bernstein, M.D., are GRANTED. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 7/28/03] (agil) [Entry date 07/28/03]
7/25/03	163	MEMORANDUM ORDER that Dft's, Lincoln Property Company's and the Stae [*sic*] of Wisconsin Investment Board Investment Company's, Motion for Summary Judgment are GRANTED as to all counts; that Christophe and Juanita Roche's, Motion for Summary Judgment is DENIED. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 7/28/03] (agil) [Entry date 07/28/03]
7/25/03	164	JUDGMENT is entered in favor of Dft's Lincoln Property Co., Swib Investment Co and against Pltfs Christophe Roche,

Juanita Roche (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD DATE: 7/28/03] (agil) [Entry date 07/28/03]

7/25/03 165 JUDGMENT for Lincoln Property Co., Swib Investment Co against Christophe Roche, Juanita Roche (entered by the clerk pursuant to the Courts order dated 7/25/03) Copies Mailed: 7/30/03 [EOD DATE: 7/30/03] (agil) [Entry date 07/30/03]

7/25/03 -- Case closed (agil) [Entry date 07/30/03]

8/4/03 166 MOTION by Juanita Roche, Christophe Roche for Reconsideration of [163-1] order granting motion for summary judgment, by Juanita Roche, Christophe Roche for New Trial (will notice) (mcke) [Entry date 08/05/03]

* * * * *

8/11/03 170 MEMORANDUM ORDER that pltf's motoin [*sic*] to remand pursuant to 28 U.S.C. 1447(c) is DENIED. It is further ORDERED that pltfs motion for rule 60(b) relief from an order of judgment that is Void is DENIED. (signed by Judge Gerald B. Lee) Copies Mailed: yes [EOD Date: 8/12/03] (mcke) [Entry date 08/12/03]

* * * * *

8/18/03 171 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [166-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [163-1] order granting motion for summary judgment and granting new trial (stas)

8/20/03 175 MOTION by Juanita Roche, Christophe Roche for Reconsideration of [170-1] the court's memorandum order of August 11, 2203 [*sic*] of pltfs' post-judgment motions (clar) [Entry date 08/21/03]

* * * * *

8/21/03 178 NOTICE OF APPEAL OF [164-1] judgment order dated 7/25/03, [165-1] judgment order dated 7/25/03 by Christophe Roche, Juanita Roche. FILING FEE $105.00 RECEIPT # 165944. Copy of notice, judgments, memoradnum [*sic*] order, docket sheet & transmittal sheet sent to USCA. Copies sent to Christophe Roche, Lincoln Property Co., Swib Investment Co, Juanita Roche (mcke) [Entry date 08/26/03]

* * * * *

8/27/03 179 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [175-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [170-1] the court's memorandum order of August 11, 2203 [*sic*] of pltfs' post-judgment motions (jcup)

* * * * *

9/3/03 180 ORDER denying [166-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [163-1] order granting motion for summary judgment, denying [175-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [170-1] the court's memorandum order of August 11, 2203 [*sic*] of pltfs' post-judgment motions (signed by Judge Gerald B. Lee)

		Copies Mailed: yes [EOD Date: 9/5/03] (mcke) [Entry date 09/05/03]
9/10/03	--	USCA Case Number Re: [178-1] appeal by plaintiffs CASE MANAGER: Mike Radday USCA NUMBER: 03-2064 (mcke) [Entry date 09/11/03]
10/17/03	--	Certification of completion sent to USCA re: [178-1] appeal by Juanita Roche, Christophe Roche (mcke)

* * * * *

7/1/04	183	Copy of Opinion of USCA re: [178-1] appeal by Juanita Roche, Christophe Roche Decided 06-30-2004 Reversed in part, vacated in part, and remanded for further proceedings as to the District Court decision; attached copy of judgment will not take effect until issuance of the mandate. (pmet) [Entry date 07/02/04] [Edit date 07/07/04]
7/28/04	184	USCA Order as to defendant Lincoln Property Co that the petition for rehearing and rehearing en banc is denied (kjon) [Entry date 07/29/04]
8/5/04	185	MOTION by Lincoln Property Co. for relief from mandate, and, in the alternative, by Lincoln Property Co. to present new evidence (stas) [Entry date 08/06/04]
8/5/04	186	MEMORANDUM by Lincoln Property Co. in support of [185-1] motion by Lincoln Property Co. for relief from mandate and, in the alternative, [185-2] motion by Lincoln Property Co. to present new evidence (LARGE PLEADING) (stas) [Entry date 08/06/04]

* * * * *

8/11/04	189	MEMORANDUM by Christophe Roche, Juanita Roche in opposition to [185-1] motion by Lincoln Property Co. for relief from mandate, [185-2] motion by Lincoln Property Co. to present new evidence (large pleading) (jcup) [Edit date 08/11/04]

* * * * *

8/16/04	191	Copy of Opinion of USCA re: [178-1] appeal by Juanita Roche, Christophe Roche Decided 06-30-2004 Reverses in part and Vacates in part the District Court decision. This case is remanded to the District Court for further proceedings consistent with the Court's opinion; attached copy of judgment will not take effect until issuance of the mandate. (pmet)
8/17/04	192	REPLY MEMORANDUM in support by Lincoln Property Co. of [185-1] motion by Lincoln Property Co. for relief from mandate, [185-2] motion by Lincoln Property Co. to present new evidence (clar)
8/19/04	193	MOTIÓN by Juanita Roche, Christophe Roche for Leave to File Surrebuttle Memo (to defts' Reply in Support to Motion for Relief from Mandate) (jsol)
8/20/04	--	Minute entry: (GBL) r: Wilson. Appearamces [*sic*]: Counsel. On for hearing on deft motion for relief from mandate/ present new evidence – argued and case is remanded back to Fx Co Circuit Court. Order to follow. (jsol)
8/23/04	194	ORDER for reasons stated in open court on 8/20/04, [185-1] motion for relief from mandate, and [185-2] motion by Lincoln Property Co. to present new evidence is

denied. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 8/25/04] (jsol) [Entry date 08/25/04]

* * * * *

12/9/04 -- USCA Letter: We have received notice from the Supreme Court that a petition for writ of certiorari has been filed in this case (kjon)

* * * * *

3/7/05 208 Letter to court from USCA re: a supreme court order was filed on 2/28/05 granting certiorari. (this letter goes with the notice of appeal that was filed on 8/21/03, USCA # 03-2064) (mcke) [Entry date 03/08/05]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2064

CHRISTOPHER ROCHE; JUANITA ROCHE,
Plaintiffs-Appellants,

v.

LINCOLN PROPERTY COMPANY;
SWIB INVESTMENT COMPANY,
Defendants-Appellees,

AND

INVESCO INSTITUTIONAL,
Defendant.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
9/5/03	Docketing statement filed by Appellant Christopher Roche, Appellant Juanita Roche [3859052-1]. T/S needed [Y/N]: n. T/S already on file?: n/a. [03-2064] ~ [3859052] (mr)
9/9/03	Civil case docketed. (mr)
9/9/03	Docketing notice issued. [03-2064] ~ [3851210] (mr)
	* * * * *
11/19/03	Brief and joint appendix filed by Appellant Christopher Roche, Appellant Juanita Roche. Copies of brief: 8. # brf pages: 56. Sufficient[Y/N]?: y. SEALED vol. [Y/N]?: n. Copies of apx: 6 copies each of vols. 1-5. # apx pages: 1064. 2-sided copying[Y/N]?: y. Method of filing w/court: HD. Date of Service on parties: 11/19/03.

Type of service on parties: PM. Appellee brief due 12/22/03 for Swib Investment Co, for Lincoln Property Co. [03-2064] ~ [3889637] (mr)

12/22/03 Brief filed by Appellee Lincoln Property Co, Appellee Swib Investment Co. Copies of brief: 8. # brf pages: 69. Sufficient [Y/N]?: y. SEALED?[Y/N]: n. Method of filing w/ court: HD. Date of Service on parties: 12/22/03. Type of service on parties: PM. [03-2064] ~ [3906543] (mr)

* * * * *

12/23/03 Supplemental joint appendix filed by Appellee Lincoln Property Co, Appellee Swib Investment Co. per 12/23/03 order. Copies of apx: 5 copies each of sup jt.apx vols. 1, 2. # apx pages: 623. Sufficient? [Y/N]: y. SEALED vol.[Y/N]?: n. [03-2064] ~ [3906568] (mr)

1/8/04 Reply brief filed by Appellant Christopher Roche, Appellant Juanita Roche. Copies of brief: 8. # brf pages: 35. Sufficient [Y/N]?: y. SEALED[Y/N]?: n. Method of filing w/ court: HD. Date of Service on parties: 1/8/04. Type of service on parties: PM. [03-2064] ~ [3913751] (mr)

1/27/04 Motion with memorandum in support of the motion filed by Appellee Lincoln Property Co, Appellee Swib Investment Co to strike reply brief brief [3922630-1]. [03-2064] ~ [3922630] (dad)

1/27/04 Response/answer requested to motion to strike brief [3922630-1] Response/answer due 2/9/04 for Juanita Roche, for Christopher Roche. [03-2064] ~ [3922761] (ta)

2/10/04 Response/answer filed [3931401-1] by Appellant Christopher Roche, Appellant Juanita Roche to motion to strike brief [3922630-1]. [03-2064] ~ [3931401] (mr)

2/11/04 ORDER FILED [3931908] deferring action on motion to strike brief pending assignment of this case to a panel for review along with the merits of this case [3922630-1]. Copies to all parties. [03-2064] ~ [3931908] (mr)

2/12/04 Response/answer filed by Appellant Christopher Roche, Appellant Juanita Roche amending response/answer [3931401-1] [3932803-1]. [03-2064] (mr)

* * * * *

2/23/04 Reply filed by Appellee Lincoln Property Co, Appellee Swib Investment Co to response/answer [3931401-1]. [3938003-1] 03-2064] ~ [3938003] (mr)

* * * * *

5/5/04 Oral argument heard. Panel: Honorable H. E. Widener, Honorable Roger L. Gregory, Honorable C. A. Beam. Courtroom Deputy: SCC. [03-2064] (carr)

6/30/04 Published, authored opinion filed. Copies to all parties. [03-2064] (mr)

6/30/04 Informal action taken mooting motion to strike brief [3922630-1]. [03-2064] ~ [4008963] (mr)

6/30/04 Judgment order filed. Decision: reversed in part, vacated in part, and remanded. EOD Date: 6/30/04. [03-2064] ~ [4008965] (mr)

* * * * *

7/14/04	Petition filed by Appellee Swib Investment Co, Appellee Lincoln Property Co for rehearing [4016031-1], for rehearing en banc. Number of copies filed: original + 19 [4016031-2]. [03-2064] ~ [4016031] (mr)
	* * * * *
7/27/04	COURT ORDER filed [4023030] denying motion for rehearing [4016031-1], denying motion for rehearing en banc [4016031-2]. EOD Date: 7/27/04. Copies to all parties. ~ [4023030] [03-2064] (mr)
	* * * * *
7/30/04	Motion filed by Appellee Swib Investment Co, Appellee Lincoln Property Co to stay the mandate [4026195-1]. [03-2064] ~ [4026195] (mr)
8/4/04	COURT ORDER filed [4028607] denying motion to stay mandate [4026195-1]. Copies to all parties. ~ [4028607] [03-2064] (mr)
	* * * * *
8/12/04	Mandate issued. ~ [4032849] [03-2064] (dad)
12/7/04	Supreme Court notice that petition for certiorari was filed on 11/24/04. Spct No.: 04-712 Spct Pty 1: Lincoln Property Co., et al Spct Pty 2: Christopher Roche, et al. [03-2064] ~ [4098100] (mst)
3/4/05	Supreme Court order received granting petition certiorari [4098100-1] on 02/28/05. [03-2064] ~ [4145957] (dhb)

[seal omitted] COMMONWEALTH OF VIRGINIA [seal omitted]

Circuit Court of Fairfax County

4110 Chain Bridge Road
Fairfax, Virginia 22030
703-246-4358

To: LINCOLN PROPERTY CO
T/A LINCOLN PROP CO ECW INC
SERVE R/A CMWTH LEGAL SVC CORP
4701 COX RD SUITE 301
GLEN ALLEN, VA

NOTICE OF MOTION FOR JUDGMENT

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 26th day of Aug 2002.

Law No. L206874

John T. Frey, Clerk

By: /s/ JANET L. [illegible]
Deputy Clerk

PHILLIPS, JERRY M. P.Q.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CHRISTOPHE ROCHE,
Plaintiff

v. LAW NO 206874

LINCOLN PROPERTY COMPANY
T/A LINCOLN PROPERTY COMPANY ECW, INC.,
Agent
3500 Lincoln Plaza
500 North Akard Street, Suite 3300
Dallas, Texas 72501,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
INVESCO INSTITUTIONAL (N/A, INC.)
INSTITUTIONAL DIVISION OF AMVESCAP
A/K/A INVESCO REALTY ADVISORS,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
SWIB INVESTMENT COMPANY
STATE OF WISCONSIN INVESTMENT BOARD
LINCOLN PROPERTY COMPANY
1155 Herndon Parkway
Herndon, Virginia
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, Christophe Roche, by counsel, and respectfully motions the Court for Judgment against the defendants, for the following reasons

1. Plaintiff, Christophe Roche, is a citizen of Fairfax County, Virginia, residing at 13620 Bent Tree Circle, Unit 302, Centreville, Virginia 20120.

2. This Court has jurisdiction of this matter as all of the causes of actions and injuries occurred in Fairfax County, Virginia.

3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. [Henceforth, Lincoln Property Company will be referred to as ("Lincoln")].

4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.

5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

6. Defendant, INVESCO, an institutional division of AMVESCAP, is an investment management group. Upon information and belief, INVESCO, for all relevant

purposes arid times related to this complaint, traded by and through "INVESCO Realty Advisors."

7. INVESCO Realty Advisors, through its wholly owned and/or sponsored investment affiliate and/or subsidiary, SWIB Investment Company, was the owner of 5111 Woodmere Drive, Centreville, Virginia. [Defendant, SWIB Investment Company will hereafter be referred to as ("SWIB")].

8. Upon information and belief, defendant/owner as described above, SWIB, by and through defendants INVESCO and Lincoln, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 5111 Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale in 2002, will determine if additional defendant or defendants will be named.

9. Upon information and belief, defendant/owner, as described above, SWIB, by and through defendants INVESCO and Lincoln, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 5111 Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale, will determine if additional defendant or defendants will be named.

10. Plaintiff, Christophe Roche, [hereinafter referred to as ("Roche")], and Juanita Castillo (Roche), signed a Lease with the owner, believed to be "SWIB" or "INVESCO" and Lincoln Property for 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (hereinafter this location will be referred to as "the Roche apartment"), which Lease is in the possession of the Defendant Lincoln. [Roche has made request for copies of this Lease from the landlord. His only copy of this Lease

was taken and/or lost by the landlord during a forced "move out" described below. As of the date of filing, the lease has not been provided, even though it has been requested in person and in writing.]

11. The above-described Lease sets forth the terms and obligations of the parties to the Roche apartment.

12. All the defendants are engaged in the real estate investment and/or property management business and trade under the various names listed above.

13. The defendants, at the time of the occurrence in question, and upon information and belief, currently own and operate Westfield Village Apartments located in Fairfax County, Virginia, as described above.

14. Roche and his family leased an apartment in the complex (Unit 104) from the defendants, as described above, under the terms of the Lease.

15. Roche was a resident/tenant at Westfield Village during all relevant times and for many months before he started a six-week employment with Lincoln Property, and gave numerous notifications of the problems that are described below.

16. Lincoln breached the Lease by ignoring the notifications of moisture damage which resulted in the formation of toxic mold that adversely affected the personal property and health of the Roche family.

17. For months, the Roche family advised Lincoln of water leaks that needed repairing. Holes had been cut in the walls of his apartment by the landlord that needed to be repaired, along with carpet that had been torn up, and the fact that mold was all over his apartment was brought to Lincoln's attention.

18. Numerous requests were made for rectifying this problem, and most of the notices were personally given by Roche. In addition to written letters, all of the warnings of the mold problems were disregarded.

19. Lincoln held itself out through its advertisements and inducement to prospective residents that they

"provide exemplary service in a quality home environment," and which inducement was the primary and material reason why Roche entered into the Lease. Lincoln had advertised that they provided 24 hour technical maintenance service, and had in effect a same-day service request policy.

20. Due to the failures and breach of its duties, as described below, Roche and his family, including his six year-old son, have been personally injured, as further described below.

21. The plaintiff has suffered injuries in connection with the exposure to the toxic mold and has been treated by physicians for these injuries, all caused by the breach of duties owed by Lincoln.

22. All the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment, including but limited, as follows:

a. In failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits.

b. In failing to inspect the apartment to determine if it was subject to water damage, mold damage, excessive moisture, etc.

c. In failing to provide Roche's family with a safe place to live;

d. In failing to adequately inspect the apartment for defects in the heating and air conditioning units and in the substrate duct material as well as condensation drain lines and filtration systems employed by the HVAC.

e. In providing, operating and maintaining the apartment in question with unsafe conditions, namely; recalled polybutylene water piping throughout the entire building. Through research, the pipes were known to

rupture and cause massive water damage. As a result, older appliances such as washers, dryers, refrigerators, and dish washers were rusted out and leaking, leading to failure. Roche's washing machine water pump malfunctioned and flooded the apartment.

f. In providing, operating and maintaining the apartment with the knowledge, actual or constructive, that the apartment contained unsafe molding exposure and toxins, including Stachybotrys chartarum, Aspergillus, Penicillium, and other fungus species, which all contained dangerous levels of micro toxins.

g. In failing to repair and replace the unsafe conditions in the apartment;

h. In failing to provide prompt or reasonable maintenance in situations where service requests were placed with the office as promised by advertising and the lease agreement to the Roche family. Emergency calls, such as leaks, were ignored despite their urgency, and in contrast to the lease that warranted twenty-four hour service would be available for emergencies.

23. Each of the above acts and omissions, singularly and in combination with others, constitute a common law and/or statutory negligence that proximately caused the toxic mold in question and the resulting damage, injuries, and destruction of property owned by the plaintiff and his family.

24. The conduct of the defendants constitutes gross negligence. This conduct also constitutes a heedless and reckless disregard and a conscious disregard of the rights of Roche and his family, and involves such an entire want of care as to indicate that it was the result of a conscious disregard of their rights, welfare and safety.

25. Further, Roche cannot more specifically allege the acts of negligence on the part of the defendants herein that proximately caused the condition to exist in question for the reason the facts in that regard are peculiarly within the knowledge of the defendants. In the alternative, in the event the plaintiff is unable to prove specific

acts of negligence, plaintiff relies upon the doctrine of *res ipsa loquitur*. In this connection, Roche would show that the maintenance and operation of the apartment in question were within the exclusive control of the defendants. Plaintiff had no means of ascertaining the method or manner in which the apartment was maintained. The occurrence causing harm to the plaintiff, as described above, was one which, in an ordinary course of events, would not have occurred without negligence on the part of the defendants. Consequently, defendants were negligent in providing and maintaining the apartment in question, which negligence was a proximate cause of the damages, injuries and losses sustained by the plaintiff, as set out more fully below.

26. As a result of exposure to toxic mold caused by the negligence of the defendants, Mr. Roche has suffered chronic migraine headaches and sinus headaches, chronic fatigue, lack of energy, dizziness, vertigo, forgetfulness, confusion, lack of concentration, stomach aches, constipation and diarrhea, blurred vision, ear pain, restless sleep, body aches, difficulty breathing, cough, burning, cramps, lesions on his body, chest pain, swollen glands in the neck and throat, loss of dexterity and/or coordination, chronic fatigue, burning eyes and eye pain.

27. Roche and his family were exposed to toxic mold for approximately one year, from March 2001 until 2002, when they were required to evacuate their apartment.

28. The Roche family was unaware of this exposure to the toxic molds, including Stachybotrys Chartarum until a Mold Investigation Report by Potomac Environmental Testing Services of Germantown, Maryland, was conducted and a report was received in March of 2002 at the Roche family's request and expense. That report stated that there was a significant amount of past water leakage, and that this is the cause of the toxic mold growth and contamination that occurred in the apartment, and that the level of contamination was extensive.

29. The occupants of Unit 104, which was the apartment leased by Roche and his family, were continuously and repeatedly exposed to toxic fungal spores during their period of occupancy. As a result of the exposure to these toxins, Roche developed physical symptoms of cough, sore throat, and skin lesions; and neurological deficits which permanently have weakened his concentration and brain processing capabilities. Juanita Roche was injured by the toxic exposure to the extent that she suffers significant short-term auditory concentration and cognitive difficulties, and has been diagnosed with Adjustment Disorder with depression and anxiety.

30. Roche is 32 years old and his wife Juanita, 23 years old, a pre-school teacher, were in general good health.

31. The Roche family, including his 11 year old son, has been subjected to anxiety not only due to their health concerns, but also because of stress from the loss of virtually all of their worldly possessions including many sentimental items, and disruption of their day-to-day life. This was caused by the exposure to the toxic mold proximately caused by the defendants' acts.

32. As a result of the above negligence of the defendants, the Roche family has been caused great inconvenience, including what amounts to a constructive eviction.

33. The Roche family was forced to move out of their apartment and was placed in another property owned by Lincoln on a temporary basis. **That property also was contaminated with toxic mold.** The temporary property within The Village at Potomac Falls, was the guest suite of the complex and was the Roche family's home for approximately a month and a half. A week after moving in, Roche was confronted by Vernon Tatem, an employee of Lincoln Property and was asked to allow Tatem to enter his unit for contracted work. In Roche's unit they entered a water closet in which access is restricted to residents by a lock. Upon unlocking and entering the water closet Roche noticed the room was infiltrated with the

same mold as the old apartment, brought on by severe water damage from the hot water over flow pipes leaking inside the closet. Upon further investigation, it was discovered that a number of units throughout that property had the same problem as well as discovering fire sprinkler control rooms with the problem as well. Upon witnessing the mold in the room, the contractor who was sent to repair the walls and remove the mold, looked at it, and warned Roche to stay back from the mold and not to breathe it and stated "Don't get near it, its [*sic*] bad news, it can cause pneumonia and other bad stuff".

34. The Roche family was temporarily moved to the Village at Potomac Falls, also managed by Lincoln. The family's pet dog and cat had to be placed in a kennel, and appeared to be affected by the toxins as they lost hair, weight, and energy. The family was displaced from March 10, 2002, to the present, without their personal clothing, furnishings, and belongings.

35. The concealment from residents of exposure to dangerous levels of toxins is and has been a conscious and predetermined plan on the part of Lincoln.

36. For the year 2001, Lincoln managed other properties in Northern Virginia and in this region, in which they were aware of the dangerousness of toxic mold. Lincoln had a written policy that was in effect at all times relevant herein, that warned their employees of the need to immediately address discovery of mold in its commercial rental properties and to take prompt action. Notwithstanding this Lincoln written policy, they ignored it in the instant case concerning the Roche family and continued a course of concealment of this highly dangerous condition from residents at their other rental properties owned or managed by Lincoln or its wholly owned subsidiaries or investment assignees.

37. During the same relevant time period, or just immediately prior thereto, Lincoln was managing Summit Village Apartments, now known as Rosslyn Heights, located in Arlington, Virginia. Moisture problems in the

apartments were brought to Lincoln's attention, and tests were conducted to determine if there had been formation of toxic molds. After getting the results of the test, Lincoln went on a course of intentional concealment of this information from the residents at Summit Village, telling the residents there that they were fixing air conditioning units in closets without disclosing to them that the tenants themselves had been exposed to toxic spores. Even as of this date, upon information and belief, those tenants are unaware of the dangerous condition created, and upon information and belief, are more likely than not, suffering from health conditions and complications due to the exposure to the toxic molds. It is estimated that approximately 55 tenant families at Summit Village, now known as Rosslyn Heights, have been exposed and may suffer from the same conditions as Roche and his family, and may have been seeking medical treatment, not aware that it was caused by the toxins due to mold formation. Lincoln went on a course to advise all of its staff to strictly keep confidential this information from the tenants, and even had a policy of only going into the apartments to remediate at Summit Village when tenants were not at home.

38. This course of deceptive conduct was the same that they subjected the Roche family to, and others at Westfield Village.

39. When the Roche family was temporarily removed to another Lincoln property, The Village at Potomac Falls, the same deception process continued, as described above. Vernon Tatem approached Roche and was asked to please remain quiet about entering the unit, since he was not authorized to inform Roche about the entering. After a month's period of residency, it was disclosed that Lincoln's upper management was aware of the mold problems as Cheryl Bel-Dean called Mr. Tatem and Peter Moriba to a meeting to instruct them to conceal the mold problems on the property, including in Roche's unit. Ms. Bel-Dean informed the men that a very large lawsuit could be filed against Lincoln. Melvin Bryant and Jon LeBeau, a

Lincoln executive officer, were also aware of the mold problem at the temporary residence. Misters Mariba and Tatum felt their jobs would be in jeopardy if they mentioned anything about the mold. Within three days of Roche filing the grievance for arbitration with Lincoln concerning his employment, Mr. Tatem was fired from his position. Later, Mr. Mariba was terminated. The carpet contractor who warned Roche about the mold was removed from all contracts on the property for sharing information about the mold condition.

40. Upon information and belief, maintenance personnel and staff of Lincoln have also been exposed to the toxins, with Lincoln's knowledge, and they have suffered similar consequences as the Roche family, but Lincoln has concealed this information from their own employees. Lincoln technicians have been unwittingly subjected to dangerous levels of toxins at Summit Village, now known as Rosslyn Heights, where the units there were classified into 5 different levels of hazardous exposure. But the Lincoln maintenance staff were never advised as to the known levels they were exposed. [Outside contracting work crews performing remediation wore fungicidal protective full body and glove coating and suits in the units. Lincoln employees were given no protective suits or told of the hazards; these same toxins are utilized as chemical and biological warfare agents because of their human destructive capability.]

41. Roche was employed by Lincoln in December of 2001.

42. As a result of Roche placing his landlord and now his employer on notice of the mold conditions in his own unit (he did not know that the toxins were in existence prior to his job with Lincoln), he was ostracized in his employment.

43. They transferred him from his normal work position and gave him an adverse employment transfer. Mr. Roche was moved to a new location for work in The Village at Potomac Falls, at which point he began to be

stripped of his benefits such as sick leave, health benefits, and others. Once the mold issue became prevalent at The Village at Potomac Falls, Mr. Roche was moved to other smaller properties. Mr. Roche would be sent to perform work at a complex and upon arriving they would inform him that no work was needed. Mr. Roche would then be made to wander the properties picking up litter, which was not in his job's duties. Eventually Mr. Roche was sent to Ashburn Meadows where he continued to be given tasks such as trash removal, light bulb changing, and painting parking curbs. Employees were also instructed not to communicate with Mr. Roche.

44. Mr. Roche brought to the attention of Lincoln the treatment he was receiving and the adverse discrimination caused by the fact that he exercised his rights to live in a safe level toxin-free apartment. Lincoln terminated Mr. Roche under a pretext, even though the matter was subject to an employment arbitration clause in Mr. Roche's employment contract. Prior to firing him on August 16, 2002, Lincoln breached that arbitration agreement by refusing to conduct the hearing before the American Arbitration Association in accordance with AAA regulations. (The rules of AAA required Lincoln to file their arbitration agreement with AAA on a yearly basis. By not filing annually, AAA required that the hearing be conducted under the Employment Arbitration Rules; Lincoln denied that, demanding that the matter be subjected to the Commercial Arbitration Rules.)

45. Lincoln proximately caused defamatory statements and adverse employment actions against Mr. Roche as described further below.

46. The above-described acts were intentionally caused by Lincoln, resulting in emotional distress and further complications to Roche's health.

47. As a result of the exposure to the toxins, the Roche family's personal property has been destroyed, lost or taken away. This has amounted to a conversion of Roche's property. This loss totals over $165,000.00 in

personal property loss, including their automobile, and does not even include the sentimental loss of such things as wedding gifts, momentos, photos, precious and priceless items to the family, including but not limited to all photographs of children, first lost teeth, Ms. Roche's wedding dress, wedding photos, every home video, all original school work of children over their lives, medical records, birth certificates, social security cards, school and health records, financial documents, sentimential [*sic*] stuffed animals and hand made items, engagement rings, gifts, diplomas and degrees, awards and other important documents.

48. Roche has suffered medical expenses caused by the exposure to the toxins, and will continue to suffer medical expenses in the future to treat his injuries, including serious breathing difficulties, memory and hearing loss, dizziness, flu-like symptoms, and lung scarring caused by the airborne toxins, known as mycotoxins.

49. The personal injuries and brain damage caused by the defendants to Roche are permanent and debilitating. Roche and his family have been placed on daily medication, in the past and for the future, to treat lungs, skill disorders, memory loss, and emotional distress caused by living out of suitcases and by destroying Mr. Roche's employment/career rights with Lincoln.

50. All of the above allegations are relevant to all the below Counts, and are incorporated by reference in each one of the below listed Counts, as if fully set forth and re-alleged therein.

(Consider each Count below as having incorporated by reference all of the above paragraphs.)

COUNT I

(Negligence ~ *Per se*)

51. Plaintiff incorporates herein by reference Paragraphs 1 through 50 above.

52. The defendants had a duty to maintain the Roche apartment with due care in accordance with their duties

as a landlord, and in accordance with the Virginia Landlord Tenant Act, and under industry standards, and to use due care and skill necessary to meet the standards of the landlord.

53. The defendants breached the aforementioned duty and was negligence [*sic*] in its maintenance of the apartment. Specific acts of negligence include, but are not limited to, the fact that they:

a. Failed to keep the apartment free from toxic material and in a livable condition, as required under the Lease, and specifically, pertaining to the requirement that they prevent dilatory intrusion of water through the walls and coverings and to prevent leakage;

b. Failed to adequately respond to notification and failure to determine the character, quality and damage and hazardous conditions in existence upon notification;

c. Failed to adequately repair known leaks that resulted in formation of mold from water infiltration throughout the areas of the apartment;

d. Failed to select an appropriate remediation system that would adequately and properly keep the apartment waterproof and free from water intrusions;

e. Failed to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with, and in conformity with, industry standards and applicable Building Codes;

f. Failed to detect errors and failures in workmanship and quality of their repairs;

g. Accepted and approved defective and/or nonconforming materials and/or labor;

h. Provided deficient workmanship and/or defective materials without proper inspection to ensure that the work was correct and in conformity with customary industry standards in accordance with the landlord/tenant obligations at common law and under the Lease and failed to follow their own policies and instructions and specifications to correct such defects;

i. Failed to adequately waterproof and properly maintain the premises which would not allow moisture and infiltration into the interior of the structure;

j. Failed to replace defective pipes in a system that was known at the time to be defective and in need of replacement the pipes being constructed of polybutylene, a material that the defendants knew should have been replaced in all of the structured apartments because of the industry standard concerning these pipes;

k. Failed to guard against the negligent acts of subcontractors;

l. Failed to correct defective conditions;

m. Failed to report the failure of installation to comply with manufacturer and other specifications; and

n. Committed other acts of negligence and breaches of the applicable Building Code and landlord/tenant obligations which may be revealed through discovery.

54. It was reasonably foreseeable that the aforementioned acts of negligence would damage the plaintiffs.

55. The Landlord/Tenant Act and Building Code and industry standards referenced above were enacted for public safety.

56. The plaintiff belongs to that class of persons whose benefit the referenced Code and industry standards were enacted.

57. As a direct and proximate result of the defendants' negligence, the plaintiff has suffered damages to their property and their person, including permanent damage to their brains, in the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest.

COUNT II

(Breach of Lease)

58. Plaintiff incorporates herein by reference Paragraphs 1 through 57 above.

59. Pursuant to the Lease between the defendant and Roche, the defendants provided an express warranty with respect to their duties to properly maintain the referenced premises.

60. As set forth herein, the apartment contained numerous latent defects which the plaintiff had no knowledge at the time he entered into the Lease, including but not limited to, the piping that was defective, and the air conditioning units, and the installation of such was of such a poor quality, and not free from faults and defects, including, but not limited to leaky piping and HVAC, and heating and air conditioning units, and rotting out drywall, and all was not in accordance with good construction practices. The latent problems and defects, unknown to Roche, occurred and manifested within the applicable warranty period.

61. By its [*sic*] promises to Roche to repair the defects, through its advertisements and inducements, the defendants committed themselves to honor its [*sic*] warranty obligations in the Lease and by common law.

62. By reason of the defects and defective condition and activities as described herein, and the spreading of toxic mold causing toxins and spores of dangerous toxins to spread throughout the apartment, and through its own testing, the defendants breached its express warranties to the plaintiff.

63. The plaintiff had notified the defendants of the defective condition of the apartment and the breaches of the express warranties, but the defendants have failed to perform necessary remedial activities to correct these defects in a timely manner.

64. By reason of its [*sic*] failure to repair or replace the aforementioned defects in a timely manner, the defendants breached their continuing duty to repair under the Lease, under the common law, and under the applicable Building Codes. Plaintiff has met all conditions precedent to recover under this warranty.

65. By reason of the defendants' breach of its express warranty, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), according to proof at trial, plus interest.

COUNT III

(Breach of Implied Warranties)

66. The plaintiff incorporates herein by reference Paragraphs 1 through 64 above.

67. By operation of law, the defendants impliedly warranted that the apartment would be habitable and free from toxic and dangerous materials.

68. Further, through its promotional literature and other representations, defendants impliedly warranted to Roche that the apartment was free from substantial defects and was constructed in a workmanlike manner in accordance with the standard of workmanlike quality prevailing at the time and place of construction, and specifically at the time that the Lease was entered into.

69. Defendants breached this warranty in that the work was not of a workmanlike quality prevailing at the time and failed to satisfy the applicable standards of habitability and contained numerous latent defects.

70. Roche, who leased the apartment only approximately 12 years after it was built, did not and could not by reasonable inspection, have discovered the defects from said breaches of the warranties of habitability and workmanship at the time they leased the apartment, and when they did discover these at the very inception of their Lease, brought them to the attention of the defendants, but no action was taken to correct the same.

71. By reason of defendants' breach of its implied warranties, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial, and will continue to suffer damages unless relief is granted.

COUNT IV

(Breach of Contract)

72. Plaintiff incorporates herein by reference Paragraphs 1 through 71 above.

73. Plaintiff was informed on or about the seventh of March, 2002 that the apartment was experiencing significant mold damage as a direct result of water intrusion damage found at the heating and air conditioning closet, the front master bath, the front entrance hall coat closet, the washer and dryer room/pantry. This water intrusion and water was damaging not only the person of Mr. Roche but his pet, children, and wife.

74. As stated herein, plaintiff's apartment contained numerous latent defects of which Roche had no knowledge until receiving the Toxic Mold Report, and that the apartment did not adequately perform the function for which it was intended and was not free from the defects described.

75. Roche informed defendants of the defects as listed in his letter.

76. Defendants agreed to perform some of the requested repairs in consideration of Roche's forbearance in filing any type of legal claim or action against them regarding the mold condition.

77. Roche accepted the defendants' offer to remediate, but defendants refused to give the assurance that the apartment would be free from the toxic mold condition.

78. On numerous occasions, Roche tried to schedule repairs but was met with resistence [*sic*].

79. The defendants breached its contract in failing to perform the necessary remedial activities to correct the defects in a timely manner.

80. The defendant materially breached the contract with the plaintiff in the particulars previously described.

81. As a direct, foreseeable and proximate result of defendants' material breach of contract, Roche has suffered

actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial. These damages include, but are not limited to the following:

a. The cost to replace all of their damaged personal property and all the personal goods and belongings;

b. The out-of-pocket expenditures incurred by the Roche family;

c. The cost of experts and consultants required to determine the extent and severity of the problems with the plaintiff's apartment, automobile and personal property;

d. Reasonable attorney's fees, as allowed by law;

e. Diminution in value of Roche's property; and

f. Other damages, including special and exemplary damages, such as loss interest and other damages to be shown at the trial of this action.

COUNT V

(Actual Fraud/Intentional Misrepresentation)

82. Plaintiff incorporates by reference Paragraphs 1 through 81 above.

83. Through its sales brochure, and advertisements, defendants misrepresented that plaintiff's home was of high quality and would be maintained.

84. Defendant Lincoln's statements referenced in the above paragraph, that the apartment was of high quality and there was prompt attention for emergency maintenance service, was false.

85. Defendants intentionally misrepresented these material facts, or made them with reckless abandon and disregard for the truth, and intended the Roche family and subsequent purchasers of apartments to rely on them in their leasing of the apartments at Westfield Village.

86. Defendants [*sic*] actions were done in willful and wanton disregard of Roche's rights.

87. Roche reasonably and justifiably relied upon the defendants' false and misleading representations of material facts, all to Roche's detriment.

88. As a direct result of defendants' actual fraud, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees, and punitive damages to the statutory limit provided.

COUNT VI

(Constructive Fraud/Negligent Misrepresentation)

89. Plaintiff incorporates herein by reference Paragraphs 1 though 88 above.

90. At the time the defendants made such false representations described above, defendants should have known of the inherent defects with the pipes, moisture leakage, unrepaired inherent defects, and should have disclosed such in its literature, which was ultimately and foreseeably distributed to Roche. Defendants failed to disclose such defects to Roche.

91. Defendants innocently or negligently misrepresented these material facts and intended the Roche family and subsequent lessees, such as Roche, to rely on them in their leasing of apartments.

92. Roche reasonably and justifiably relied upon defendants' false and misleading representations of material facts, to Roche's detriment.

93. As a direct result of defendants' constructive fraud, Roche has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees.

COUNT VII – CONSUMER FRAUD/ TREBLING OF DAMAGES

(Violation of Virginia Consumer Protection Act)

94. Plaintiff incorporates herein by reference Paragraphs 1 through 92 above.

95. The aforementioned acts by the defendants constitutes [*sic*] prohibitive practices within the meaning of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200.

96. As set forth in the paragraphs above, defendants violated the Virginia Consumer Protection Act by making statements and omissions, including, but not limited to:

a. Stating that the apartment was habitable and of high quality and would be promptly maintained upon notification of defects;

b. Omitting that they knew they had inherently defective piping systems, and moisture intrusion in existence, even though it had a policy and knowledge from its management and ownership of Summit Village, as described above, during the relevant time, and knew of the dangerousness, but yet it failed to disclose the same;

c. Advertising or offering for lease apartments that were defective, without clearly and unequivocally indicating in the advertisements or offers of lease, that the apartments were subject to the problems indicated above;

d. Misrepresenting the quality of their service and management in response to complaint or notification of defects;

e. Misrepresenting that the defendants' services were of a particular quality or standard;

f. Advertising goods or services with the intent not to honor their claims, as advertised, namely, that they would give high quality maintenance, service and habitable and high quality apartment premises, and that the premises were of a first class building quality;

g. Offering for lease defective goods;

h. Using deception, fraud, false pretense, false promise and/or misrepresentation in connection with a consumer transaction.

97. The foregoing violations of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200, *et seq.*,

were willful, and consequently support trebled damages, as contemplated under the Virginia Act.

98. Pursuant to Virginia Code Section 59.1-204(B), Roche is entitled to an award of reasonable attorney's fees and court costs.

99. As a direct and proximate result of defendants' misconduct in violation of the Virginia Consumer Protection Act, Roche has suffered actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or, according to proof at trial, including trebled damages as authorized by statute, plus interest and attorney's fees.

COUNT VIII – FALSE ADVERTISING

(Violation of Virginia Code Section 18.2-216)

100. Plaintiff incorporates herein by reference Paragraphs 1 through 99 above.

101. With the intent to lease or increase the consumption thereof by the public, and in violation of Virginia Code Section 18.2-216, the defendants published, disseminated, circulated before the public and potential consumers, including Roche, advertising information concerning the performance and characteristics of its services and apartments, which were untrue, deceptive and misleading, so as to induce the public in general, and Roche in particular, to lease the premises. This includes ads in Apartment Shoppers Guide, Consumer Guides, and internet postings proclaiming the same misleading pronouncements described above.

102. Defendants' statements constitute violation of Virginia Code Section 182-216 [*sic*], as set forth in detail above.

103. Pursuant to Virginia Code Section 18.2-216, and 59.1-68.4, Roche is entitled to recover damages and reasonable attorney's fees due to defendants' foregoing violations.

104. As a direct and proximate result of defendants' foregoing violation, Roche has suffered actual damages in

the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest, attorney's fees and court costs.

COUNT IX

(Tortuous [*sic*] Interference With Contract by Improper Methods)

105. The allegations contained in Paragraphs 1 through 109 above are incorporated herein by reference as if fully set forth herein.

106. Defendant, Lincoln, maintains at-will employment contracts with all of its employees.

107. Lincoln, on numerous occasions, tortuously [*sic*] interfered with plaintiff's employment contract by using improper methods. Defendant Lincoln employed verbal and written attempts to discredit, defame and ostracize the plaintiff with the motive to terminate him from his employment by taking adverse actions against him.

108. Lincoln employed improper methods in its tortuous [*sic*] interference with Roche's employment contract by defrauding him and giving him false assurances that they would abide by their grievance procedure, which they have refused to honor. During the course of its fraudulent conduct, Lincoln did numerous acts to frustrate his employment status and obfuscate the grievance process.

109. Lincoln employed improper methods by use of its superior position as employer over Roche.

110. Lincoln abused this confidential relationship and superior position in an effort to destroy the employment and wage earning capacity of Roche, and did not act in good faith in addressing the grievance.

111. Roche requests compensatory damages, punitive damages, and attorney's fees, that the Court may deem appropriate, for the harm caused by Lincoln's tortuous [*sic*] interference.

COUNT X

(Conversion)

112. Plaintiff incorporates Paragraphs 1 through 116 herein as if fully set out.

113. Defendant converted the personal property of Roche in the manner described above, by dispossessing Roche from his property without his consent and against his interests; and by destroying or losing property of Roche; and by wrongfully withholding property.

114. The conversion of Roche's personal property is approximately $250,000.00, of which $160,000.00 is for replacement cost for items destroyed by exposure to the toxic mold spores, and the other loss of priceless sentimental and other items that could never be replaced, such as gifts, mementos, wedding memorabilia, and as described above.

WHEREFORE, the Plaintiff, Christopher Roche, requests judgment in the amount of Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) for conversion of his personalty.

COUNT XI

(Intentional Infliction of Emotional Distress)

115. All above paragraphs are incorporated herein as if fully set out.

116. The defendants, jointly and severally, acted intentionally, or with such wanton disregard of the consequences of its actins [*sic*] to amount to a conscious disregard for the rights of others.

117. The defendants purposefully inflicted emotional distress, or intended the above-described conduct, and knew or should have known, that emotional distress would likely result.

118. This conduct described above was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality.

119. The defendants' conduct was the proximate cause of Roche's emotional distress.

120. Because the acts were intentional and/or done with reckless disregard of the rights of others, punitive damages should be awarded to deter these defendants and others from similar conduct in the future.

WHEREFORE, the Plaintiff, Christopher Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury, plus punitive damages according to law.

COUNT XII

(Negligent Infliction of Emotional Distress)

121. All above paragraphs are incorporated by reference as if fully set out.

122. Plaintiff Roche has suffered physical manifestations of injury, including aggravation of body sores, stress, and neurological damage, as a result of the defendant's conduct.

123. These injuries were caused by defendant's negligence as described above.

WHEREFORE the Plaintiff, Christophe Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS

CHRISTOPHE ROCHE
By Counsel

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703) 385-2745
Virginia State Bar No. 9211

[seal omitted] COMMONWEALTH OF VIRGINIA [seal omitted]

Circuit Court of Fairfax County

4110 Chain Bridge Road
Fairfax, Virginia 22030
703-246-4358

To: LINCOLN PROPERTY CO
T/A LINCOLN PROP CO ECW INC
SERVE R/A CMWTH LEGAL SVC CORP
4701 COX RD SUITE 301
GLEN ALLEN, VA

NOTICE OF MOTION FOR JUDGMENT

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 26th day of Aug 2002.

Law No. L206873

John T. Frey, Clerk

By: /s/ JANET L. [illegible]
Deputy Clerk

PHILLIPS, JERRY M. P.Q.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JUANITA ROCHE,
Plaintiff

v. LAW NO 206873

LINCOLN PROPERTY COMPANY
T/A LINCOLN PROPERTY COMPANY ECW, INC.,
Agent
3500 Lincoln Plaza
500 North Akard Street, Suite 3300
Dallas, Texas 72501,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
INVESCO INSTITUTIONAL (N/A, INC.)
INSTITUTIONAL DIVISION OF AMVESCAP
A/K/A INVESCO REALTY ADVISORS,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
SWIB INVESTMENT COMPANY
STATE OF WISCONSIN INVESTMENT BOARD
LINCOLN PROPERTY COMPANY
1155 Herndon Parkway
Herndon, Virginia
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, Juanita Roche, by counsel, and respectfully motions the Court for Judgment against the defendants, for the following reasons:

1. Plaintiff, Juanita Roche, is a citizen of Fairfax County, Virginia, residing at 13620 Bent Tree Circle, Unit 302, Centreville, Virginia 20120.

2. This Court has jurisdiction of this matter as all of the causes of actions and injuries occurred in Fairfax County, Virginia.

3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. [Henceforth, Lincoln Property Company will be referred to as ("Lincoln")].

4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.

5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

6. Defendant, INVESCO, an institutional division of AMVESCAP, is an investment management group. Upon information and belief, INVESCO, for all relevant

purposes and times related to this complaint, traded by and through "INVESCO Realty Advisors".

7. INVESCO Realty Advisors, through its wholly owned and/or sponsored investment affiliate and/or subsidiary, SWIB Investment Company, was the owner of 5111 Woodmere Drive, Centreville, Virginia. [Defendant, SWIB Investment Company will hereafter be referred to as ("SWIB")].

8. Upon information and belief, defendant/owner as described above, SWIB, by and through defendants INVESCO and Lincoln, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 5111 Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale, will determine if additional defendant or defendants will be named.

9. Upon information and belief, INVESCO and/or Lincoln Property, jointly or severally, have transferred the management and ownership of Summit Village Apartments, now known as Rosslyn Heights, 1804 North Quinn Street, Arlington, Virginia, to Gates, Hudson Property Management, a business entity located in Fairfax, Virginia. Whether or not this new entity has assumed liabilities or is subject to these claims, will be determined by further discovery in this cause.

10. Plaintiff, Juanita Roche, [hereinafter referred to as ("Roche")], and Christophe Roche, signed a Lease with the owner believed to be SWIB or Invesco, and Lincoln Property for 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (hereinafter this location will be referred to as "the Roche apartment"), which Lease is in the possession of the Defendant Lincoln. [Roche has made requests for copies of this Lease from the landlord. Her only copy of this Lease was taken and/or lost by the landlord during a forced "move out" described below. As

of the date of filing, the lease has not been provided even though it has been requested by Roche and by written correspondence.]

11. The above-described Lease sets forth the terms and obligations of the parties to the Roche apartment.

12. All the defendants are engaged in the real estate investment and/or property management business and trade under the various names listed above.

13. The defendants, at the time of the occurrence in question, and upon information and belief, currently own and operate Westfield Village Apartments located in Fairfax County, Virginia, as described above.

14. Roche and her family leased an apartment in the complex (Unit 104) from the defendants, as described above, under the terms of the Lease.

15. Roche was a resident/tenant at Westfield Village during all relevant times and gave numerous notifications of the problems that are described below.

16. Lincoln breached the Lease by ignoring the notifications of moisture damage which resulted in the formation of toxic mold that adversely affected the personal property and health of the Roche family.

17. For months, the Roche family advised Lincoln of water leaks that needed repairing. Holes had been cut in the walls of his [*sic*] apartment by the landlord that needed to be repaired, along with carpet that had been torn up, and the fact that mold was all over his [*sic*] apartment was brought to Lincoln's attention.

18. Numerous requests were made for rectifying this problem, and most of the notices were personally given by Roche. In addition to written letters, all of the warnings of the mold problems were disregarded by the defendants.

19. Lincoln held itself out through its advertisements and inducement to prospective residents that they "provide exemplary service in a quality home environment," and which inducement was the primary and material reason why Roche entered into the Lease. Lincoln had

advertised that they provided 24 hour technical maintenance service, and had in effect a same-day service request policy. The apartment brochure advertisement set out what the prospective tenants' expectations were under a heading "YOUR EXPECTATIONS," and stated, "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee, ..."

20. Due to the failures and breach of its duties, as described below, Roche and her family, including a six year-old son, have been personally injured, as further described below.

21. The plaintiff has suffered injuries in connection with the exposure to the toxic mold and has been treated by physicians for these injuries, all caused by the breach of duties owed by Lincoln.

22. All the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment, including but limited, as follows:

a. In failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits.

b. In failing to inspect the apartment to determine if it was subject to water damage, mold damage, excessive moisture, etc.

c. In failing to provide Roche's family with a safe place to live;

d. In failing to adequately inspect the apartment for defects in the heating and air conditioning units and in the substrate duct material as well as condensation drain lines and filtration systems employed by the HVAC.

e. In providing, operating and maintaining the apartment in question with unsafe conditions, namely; recalled polybutylene water piping throughout the entire

building. Through research, the pipes were known to rupture and cause massive water damage. As a result, older appliances such as washers, dryers, refrigerators, and dish washers were rusted out and leaking, leading to failure. Roche's washing machine water pump malfunctioned and flooded the apartment.

f. In providing, operating and maintaining the apartment with the knowledge, actual or constructive, that the apartment contained unsafe molding exposure and toxins, including Stachybotrys chartarum, Aspergillus, Penicillium, and other fungus species, which all contained dangerous levels of micro toxins.

g. In failing to repair and replace the unsafe conditions in the apartment;

h. In failing to provide prompt or reasonable maintenance in situations where service requests were placed with the office as promised by advertising and the lease agreement to the Roche family. Emergency calls, such as leaks, were ignored despite their urgency, and in contrast to the lease that warranted twenty-four hour service would be available for emergencies.

23. Each of the above acts and omissions, singularly and in combination with others, constitute [*sic*] a common law and/or statutory negligence that proximately, caused the toxic mold in question and the resulting damage, injuries, and destruction of property owned by the plaintiff and her family.

24. The conduct of the defendants constitutes gross negligence. This conduct also constitutes a heedless and reckless disregard and a conscious disregard of the rights of Roche and her family, and involves such an entire want of care as to indicate that it was the result of a conscious disregard of their rights, welfare and safety.

25. Further, Roche cannot more specifically allege the acts of negligence on the part of the defendants herein that proximately caused the condition to exist in question for the reason the facts in that regard are peculiarly within the knowledge of the defendants. In the

alternative, in the event the plaintiff is unable to prove specific acts of negligence, plaintiff relies upon the doctrine of *res ipsa loquitur*. In this connection, Roche would show that the maintenance and operation of the apartment is question were within the exclusive control of the defendants. Plaintiff had no means of ascertaining the method or manner in which the apartment was maintained. The occurrence causing harm to the plaintiff, as described above, was one which, in an ordinary course of events, would not have occurred without negligence on the part of the defendants. Consequently, defendants were negligent in providing and maintaining the apartment in question, which negligence was a proximate cause of the damages, injuries and losses sustained by the plaintiff, as set out more fully below.

26. As a result of exposure to toxic mold caused by the negligence of the defendants, Ms. Roche has suffered chronic migraine headaches and sinus headaches, chronic fatigue, lack of energy, dizziness, vertigo, forgetfulness, confusion, lack of concentration, stomach aches, constipation and diarrhea, blurred vision, ear pain, restless sleep, body aches, difficulty breathing, cough, burning, cramps, chest pain, swollen glands in the neck and throat, loss of dexterity and/or coordination, chronic fatigue, burning eyes and eye pain.

27. Roche and her family were exposed to toxic mold for approximately one year, from March 2001 until 2002, when they were required to evacuate their apartment.

28. The Roche family was unaware of this exposure to the toxic molds, including Stachybotrys Chartarum until a Mold Investigation Report by Potomac Environmental Testing Services of Germantown, Maryland, was conducted and a report was received in March of 2002 at the Roche family's request and expense. That report stated that there was a significant amount of past water leakage, and that this is the cause of the toxic mold growth and contamination that occurred in the apartment, and that the level of contamination was extensive.

29. The occupants of Unit 104, which was the apartment leased by Roche and her family, were continuously and repeatedly exposed to toxic fungal spores during their period of occupancy. As a result of the exposure to these toxins, Ms. Roche developed physical symptoms of cough, sore throat, and neurological deficits which permanently have weakened her concentration and brain processing capabilities, and she has been diagnosed with Adjustment Disorder with depression and anxiety.

30. Roche is 23 years old pre-school teacher, and her husband, Christophe, 32 years old, were in general good health.

31. The Roche family, including their 6 year-old son, has been subjected to anxiety not only due to their health concerns, but also because of stress from the loss of virtually all of their worldly possessions including many sentimental items, and disruption of their day-to-day life. This was caused by the exposure to the toxic mold proximately caused by the defendants' acts.

32. As a result of the above negligence of the defendants, the Roche family has been caused great inconvenience, including what amounts to a constructive eviction.

33. The Roche family was forced to move out of their apartment and was placed in another property owned by Lincoln on a temporary basis. **That property also was contaminated with toxic mold.** The temporary property within The Village at Potomac Falls, was the guest suite of the complex and was the Roche family's home for approximately a month and a half. A week after moving in, Mr. Roche was confronted by Vernon Tatem, an employee of Lincoln Property and was asked to allow Tatem to enter his unit for contracted work. In Roche's unit they entered a water closet in which access is restricted to residents by a lock. Upon unlocking and entering the water closet, Mr. Roche noticed the room was infiltrated with the same mold as the old apartment, brought on by severe water damage from the hot water over flow pipes leaking inside the closet. Upon further investigation, it was

discovered that a number of units throughout that property had the same problem as well as discovering fire sprinkler control rooms with the problem as well. Upon witnessing the mold in the room, the contractor who was sent to repair the walls and remove the mold, looked at it, and warned Mr. Roche to stay back from the mold and not breathe it and stated "Don't get near it, its [*sic*] bad news, it can cause pneumonia and other bad stuff".

34. The Roche family was temporarily moved to the Village at Potomac Falls, also managed by Lincoln. The family's pet dog and cat had to be placed in a kennel, and appeared to be affected by the toxins as they lost hair, weight, and energy. The family was displaced from March 10, 2002, up and to the present, without their personal clothing, furnishings, and belongings.

35. The concealment from residents of exposure to dangerous levels of toxins is and has been a conscious and predetermined plan on the part of Lincoln.

36. For the year 2001, Lincoln managed other properties in Northern Virginia and in this region, in which they were aware of the dangerousness of toxic mold. Lincoln had a written policy that was in effect at all times relevant herein, that warned their employees of the need to immediately address discovery of mold in its commercial rental properties and to take prompt action. Notwithstanding this Lincoln written policy, they ignored it in the instant case concerning the Roche family and continued a course of concealment of this highly dangerous condition from residents at their other rental properties owned or managed by Lincoln or its wholly owned subsidiaries or investment assignees.

37. During the same relevant time period, or just immediately prior thereto, Lincoln was managing Summit Village Apartments (now known as Rosslyn Heights) located in Arlington, Virginia. Moisture problems in the apartments were brought to Lincoln's attention, and tests were conducted to determine if there had been formation of toxic molds. After getting the results of the test,

Lincoln went on a course of intentional concealment of this information from the residents at Summit Village, telling the residents there that they were fixing air conditioning units in closets without disclosing to them that the tenants themselves had been exposed to toxic spores. Even as of this date, upon information and belief, those tenants are unaware of the dangerous condition created, and upon information and belief, are more likely than not, suffering from health conditions and complications due to the exposure to the toxic molds. It is estimated that approximately 55 tenant families at Summit Village, now known as Rosslyn Heights, have been exposed and may suffer from the same conditions as Roche and his family, and may have been seeking medical treatment, not aware that it was caused by the toxins due to mold formation. Lincoln went on a course to advise all of its staff to strictly keep confidential this information from the tenants, and even had a policy of only going into the apartments to remediate at Summit Village when tenants were not at home.

38. This course of deceptive conduct was the same that they subjected the Roche family to, and others at Westfield Village.

39. When the Roche family was temporarily removed to another Lincoln property, The Village at Potomac Falls, the same deception process continued, as described above. Vernon Tatem approached Mr. Roche and was asked to please remain quiet about entering the unit, since he was not authorized to inform Mr. Roche about the entering. After a month's period of residency, it was disclosed that Lincoln's upper management was aware of the mold problems as Cheryl Bel-Dean called Mr. Tatem and Peter Moriba to a meeting to instruct them to conceal the mold problems on the property, including in Roche's unit. Ms. Bel-Dean informed the men that a very large lawsuit could be filed against Lincoln. Melvin Bryant and Jon LeBeau, a Lincoln executive officer, were also aware of the mold problem at the temporary residence. Misters Peter Mariba and Tatum felt their jobs would be in

jeopardy if they mentioned anything about the mold. Within three days of Mr. Roche filing a grievance for arbitration with Lincoln concerning his employment, Mr. Tatem was fired from his position. Later, Mr. Peter Mariba, was terminated. The carpet contractor who warned Mr. Roche about the mold, was removed from all contracts on the property for sharing information about the mold condition.

40. Upon information and belief, maintenance personnel and staff of Lincoln have also been exposed to the toxins, with Lincoln's knowledge, and they have suffered similar consequences as the Roche family, but Lincoln has concealed this information from their own employees. Lincoln technicians have been unwittingly subjected to dangerous levels of toxins at Summit Village (now known as Rosslyn Heights), where the units there were classified into 5 different levels of hazardous exposure. But the defendants' maintenance staff were not advised as to the known levels they were exposed. [Outside contracting work crews performing remediation wore fungicidal protective full body and glove coating and suits in the units. Lincoln employees were given no protective suits or told of the hazards; these same toxins are utilized as chemical and biological warfare agents because of their human destructive capability.]

41. Roche was employed by Lincoln in December of 2001.

42. As a result of Mr. Roche placing his landlord and now his employer on notice of the mold conditions in his own unit (he did not know that the toxins were in existence prior to his job with Lincoln), he was ostracized in his employment.

43. They transferred him from his normal work position and gave him an adverse employment transfer. Mr. Roche was moved to a new location for work in The Village at Potomac Falls, at which point he began to be stripped of his benefits such as sick leave, health benefits, and others. Once the mold issue became prevalent at The

Village at Potomac Falls, Mr. Roche was moved to other smaller properties. Mr. Roche would be sent to perform work at a complex and upon arriving they would inform him that no work was needed. Mr. Roche would then be made to wander the properties picking up litter, which was not in his job's duties. Eventually Mr. Roche was sent to Ashburn Meadows where he continued to be given tasks such as trash removal, light bulb changing, and painting parking curbs. Employees were also instructed not to communicate with Mr. Roche.

44. Mr. Roche brought to the attention of Lincoln the treatment he was receiving and the adverse discrimination caused by the fact that he exercised his rights to live in a safe level toxin-free apartment. Lincoln terminated Mr. Roche under a pretext, even though the matter was subject to an employment arbitration clause in Mr. Roche's employment contract. Prior to firing him on August 16, 2002. Lincoln breached that arbitration agreement by refusing to conduct the hearing before the American Arbitration Association in accordance with AAA regulations. (The rules of AAA required Lincoln to file their arbitration agreement with AAA on a yearly basis. By not filing annually, AAA required that the hearing be conducted under the Employment Arbitration Rules; Lincoln denied that, demanding that the matter be subjected to the Commercial Arbitration Rules.)

45. Lincoln proximately caused defamatory statements and adverse employment actions against Mr. Roche as described.

46. The above-described acts were intentionally caused by Lincoln, resulting in emotional distress and further complications to Ms. Roche's health.

47. As a result of the exposure to the toxins, the Roche family's personal property has been destroyed, lost or taken away. This has amounted to a conversion of Roche's property. This loss totals over $165,000.00 in personal property loss, including their automobile, and does not even include the sentimental loss of such things as

wedding gifts, momentos, photos, precious and priceless items to the family, including but not limited to all photographs of children, first lost teeth, Ms. Roche's wedding dress, wedding photos, every home video, all original school work of children over their lives, medical records, birth certificates, social security cards, school and health records, financial documents, sentimential [*sic*] stuffed animals and hand made items, engagement rings, gifts, diplomas and degrees, awards and other important documents.

48. Roche has suffered medical expenses caused by the exposure to the toxins, and will continue to suffer medical expenses in the future to treat her injuries, including serious breathing difficulties, memory and hearing loss, dizziness, flu-like symptoms, and lung scarring caused by the airborne toxins, known as mycotoxins.

49. The personal injuries and brain damage caused by the defendants to Roche are permanent and debilitating. Roche and her family have been placed on daily medication, in the past and for the future, to treat lungs, skill disorders, memory loss, and emotional distress caused by living out of suitcases and by destroying Mr. Roche's employment/career rights with Lincoln.

50. All of the above allegations are relevant to all the below Counts, and are incorporated by reference in each one of the below listed Counts, as if fully set forth and re-alleged therein.

(Consider each Count below as having incorporated by reference all of the above paragraphs.)

COUNT I

(Negligence ~ *Per se*)

51. Plaintiff incorporates herein by reference Paragraphs 1 through 50 above.

52. The defendants had a duty to maintain the Roche apartment with due care in accordance with their duties as a landlord, and in accordance with the Virginia Landlord Tenant Act, and under industry standards, and to

use due care and skill necessary to meet the standards of the landlord.

53. The defendants breached the aforementioned duty and was negligence [*sic*] in its maintenance of the apartment. Specific acts of negligence include, but are not limited to, the fact that they:

a. Failed to keep the apartment free from toxic material and in a livable condition, as required under the Lease, and specifically, pertaining to the requirement that they prevent dilatory intrusion of water through the walls and coverings and to prevent leakage;

b. Failed to adequately respond to notification and failure to determine the character, quality and damage and hazardous conditions in existence upon notification;

c. Failed to adequately repair known leaks that resulted in formation of mold from water infiltration throughout the areas of the apartment;

d. Failed to select an appropriate remediation system that would adequately and properly keep the apartment waterproof and free from water intrusions;

e. Failed to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with, and in conformity with, industry standards and applicable Building Codes;

f. Failed to detect errors and failures in workmanship and quality of their repairs;

g. Accepted and approved defective and/or nonconforming materials and/or labor;

h. Provided deficient workmanship and/or defective materials without proper inspection to ensure that the work was correct and in conformity with customary industry standards in accordance with the landlord/tenant obligations at common law and under the Lease and failed to follow their own policies and instructions and specifications to correct such defects;

i. Failed to adequately waterproof and properly maintain the premises which would not allow moisture and infiltration into the interior of the structure;

j. Failed to replace defective pipes in a system that was known at the time to be defective and in need of replacement, the pipes being constructed of polybutylene, a material that the defendants knew should have been replaced in all of the structured apartments because of the industry standard concerning these pipes;

k. Failed to guard against the negligent acts of subcontractors;

l. Failed to correct defective conditions;

m. Failed to report the failure of installation to comply with manufacturer and other specifications; and

n. Committed other acts of negligence and breaches of the applicable Building Code and landlord/tenant obligations which may be revealed through discovery.

54. It was reasonably foreseeable that the aforementioned acts of negligence would damage the plaintiffs.

55. The Landlord/Tenant Act and Building Code and industry standards referenced above were enacted for public safety.

56. The plaintiff belongs to that class of persons whose benefit the referenced Code and industry standards were enacted.

57. As a direct and proximate result of the defendants' negligence, the plaintiff has suffered damages to their property and their person, including permanent damage to their brains, in the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest.

COUNT II

(Breach of Lease)

58. Plaintiff incorporates herein by reference Paragraphs 1 through 57 above.

59. Pursuant to the Lease between the defendant and Roche, the defendants provided an express warranty with respect to their duties to properly maintain the referenced premises.

60. As set forth herein, the apartment contained numerous latent defects which the plaintiff had no knowledge at the time he entered into the Lease, including but not limited to, the piping that was defective, and the air conditioning units, and the installation of such was of such poor quality, and not free from faults and defects, including, but not limited to leaky piping and HVAC, and heating and air conditioning units, and rotting out drywall, and all was not in accordance with good construction practices. The latent problems and defects, unknown to Roche, occurred and manifested within the applicable warranty period.

61. By its promises to Roche to repair the defects, through its advertisements and inducements, the defendants committed themselves to honor its warranty obligations in the Lease and by common law.

62. By reason of the defects and defective condition and activities as described herein, and the spreading of toxic mold causing toxins and spores of dangerous toxins to spread throughout the apartment, and through its own testing, the defendants breached its express warranties to the plaintiff.

63. The plaintiff had notified the defendants of the defective condition of the apartment and the breaches of the express warranties, but the defendants have failed to perform necessary remedial activities to correct these defects in a timely manner.

64. By reason of its failure to repair or replace the aforementioned defects in a timely manner, the defendants breached their continuing duty to repair under the Lease, under the common law, and under the applicable Building Codes. Plaintiff has met all conditions precedent to recover under this warranty.

65. By reason of the defendants' breach of its express warranty, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), according to proof at trial, plus interest.

COUNT III

(Breach of Implied Warranties)

66. The plaintiff incorporates herein by reference Paragraphs 1 through 64 above.

67. By operation of law, the defendants impliedly warranted that the apartment would be habitable and free from toxic and dangerous materials.

68. Further, through its promotional literature and other representations, defendants impliedly warranted to Roche that the apartment was free from substantial defects and was constructed in a workmanlike manner in accordance with the standard of workmanlike quality prevailing at the time and place of construction, and specifically at the time that the Lease was entered into.

69. Defendants breached this warranty in that the work was not of a workmanlike quality prevailing at the time and failed to satisfy the applicable standards of habitability and contained numerous latent defects.

70. Roche, who leased the apartment only approximately 12 years after it was built, did not and could not by reasonable inspection, have discovered the defects from said breaches of the warranties of habitability and workmanship at the time they leased the apartment, and when they did discover these at the very inception of their Lease, brought them to the attention of the defendants, but no action was taken to correct the same.

71. By reason of defendants' breach of its implied warranties, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial, and will continue to suffer damages unless relief is granted.

COUNT IV

(Breach of Contract)

72. Plaintiff incorporates herein by reference Paragraphs 1 through 71 above.

73. Plaintiff was informed on or about the seventh of March, 2002 that the apartment was experiencing significant mold damage as a direct result of water intrusion damage found at the heating and air conditioning closet, the front master bath, the front entrance hall coat closet, the washer and dryer room/pantry. This water intrusion and water was damaging not only the person of Ms. Roche but her pet, children, and husband.

74. As stated herein, plaintiff's apartment contained numerous latent defects of which Roche had no knowledge until receiving the Toxic Mold Report, and that the apartment did not adequately perform the function for which it was intended and was not free from the defects described.

75. Roche informed defendants of the defects as listed in his letter.

76. Defendants agreed to perform some of the requested repairs in consideration of Roche's forbearance in filing any type of legal claim or action against them regarding the mold condition.

77. Roche accepted the defendants' offer to remediate, but defendants refused to give the assurance that the apartment would be free from the toxic mold condition.

78. On numerous occasions, Roche tried to schedule repairs but was met with resistance.

79. The defendants breached its contract in failing to perform the necessary remedial activities to correct the defects in a timely manner.

80. The defendant materially breached the contract with the plaintiff in the particulars previously described.

81. As a direct, foreseeable and proximate result of defendants' material breach of contract, Roche has suffered

actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial. These damages include, but are not limited to the following:

a. The cost to replace all of their damaged personal property and all the personal goods and belongings;

b. The out-of-pocket expenditures incurred by the Roche family;

c. The cost of experts and consultants required to determine the extent and severity of the problems with the plaintiff's apartment, automobile and personal property;

d. Reasonable attorney's fees, as allowed by law;

e. Diminuti n in value of Roche's property; and

f. Other damages, including special and exemplary damages, such as loss interest and other damages to be shown at the trial of this action.

COUNT V

(Actual Fraud/Intentional Misrepresentation)

82. Plaintiff incorporates by reference Paragraphs 1 through 81 above.

83. Through its sales brochure, and advertisements, defendants misrepresented that plaintiff's home was of high quality and would be maintained.

84. Defendant Lincoln's statements referenced in the above paragraph, that the apartment was of high quality and there was prompt attention for emergency maintenance service, including the guarantee of 24-hour service, was false.

85. Defendants intentionally misrepresented these material facts, or made them with reckless abandon and disregard for the truth, and intended the Roche family and subsequent tenants of apartments to rely on them in their leasing of the apartments at Westfield Village.

86. Defendants [*sic*] actions were done in wilful and wanton disregard of Roche's rights.

87. Roche reasonably and justifiably relied upon the defendants' false and misleading representations of material facts, all to Roche's detriment.

88. As a direct result of defendants' actual fraud, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees, and punitive damages to the statutory limit provided.

COUNT VI

(Constructive Fraud/Negligent Misrepresentation)

89. Plaintiff incorporates herein by reference Paragraphs 1 though 88 above.

90. At the time the defendants made such false representations described above, defendants should have known of the inherent defects with the pipes, moisture leakage, unrepaired inherent defects, and should have disclosed such in its literature, which was ultimately and foreseeably distributed to Roche. Defendants failed to disclose such defects to Roche.

91. Defendants innocently or negligently misrepresented these material facts and intended the Roche family and subsequent lessees, such as Roche, to rely on them in their leasing of apartments.

92. Roche reasonably and justifiably relied upon defendants' false and misleading representations of material facts, to Roche's detriment.

93. As a direct result of defendants' constructive fraud, Roche has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees.

COUNT VII - CONSUMER FRAUD/ TREBLING OF DAMAGES

(Violation of Virginia Consumer Protection Act)

94. Plaintiff incorporates herein by reference Paragraphs 1 through 92 above.

95. The aforementioned acts by the defendants constitutes [*sic*] prohibitive practices within the meaning of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200.

96. As set forth in the paragraphs above, defendants violated the Virginia Consumer Protection Act by making statements and omissions, including, but not limited to:

a. Stating that the apartment was habitable and of high quality and would be promptly maintained upon notification of defects;

b. Omitting that they knew they had inherently defective piping systems, and moisture intrusion in existence, even though it had a policy and knowledge from its management and ownership of Summit Village, as described above, during the relevant time, and knew of the dangerousness, but yet it failed to disclose the same;

c. Advertising or offering for lease apartments that were defective, without clearly and unequivocally indicating in the advertisements or offers of lease, that the apartments were subject to the problems indicated above;

d. Misrepresenting the quality of their service and management in response to complaint or notification of defects;

e. Misrepresenting that the defendants' services were of a particular quality or standard;

f. Advertising goods or services with the intent not to honor their claims, as advertised, namely, that they would give high quality maintenance, service and habitable and high quality apartment premises, and that the premises were of a first class building quality;

g. Offering for lease defective goods;

h. Using deception, fraud, false pretense, false promise and/or misrepresentation in connection with a consumer transaction.

97. The foregoing violations of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200, *et seq.*,

were willful, and consequently support trebled damages, as contemplated under the Virginia Act.

98. Pursuant to Virginia Code Section 59.1-204(B), Roche is entitled to an award of reasonable attorney's fees and court costs.

99. As a direct and proximate result of defendants' misconduct in violation of the Virginia Consumer Protection Act, Roche has suffered actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or, according to proof at trial, including trebled damages as authorized by statute plus interest and attorney's fees.

COUNT VIII – FALSE ADVERTISING

(Violation of Virginia Code Section 18.2-216)

100. Plaintiff incorporates herein by reference Paragraphs 1 through 99 above.

101. With the intent to lease or increase the consumption thereof by the public, and in violation of Virginia Code Section 18.2-216, the defendants published, disseminated, circulated before the public and potential consumers, including Roche, advertising information concerning the performance and characteristics of its services and apartments, which were untrue, deceptive and misleading, so as to induce the public in general, and Roche in particular, to lease the premises. This includes ads in Apartment Shoppers Guide, Consumer Guides, and internet postings proclaiming the same misleading pronouncements described above.

102. Defendants' statements constitute violation of Virginia Code Section 18.2-216, as set forth in detail above.

103. Pursuant to Virginia Code Section 18.2-216, and 59.1-68.3, Roche is entitled to recover damages and reasonable attorney's fees due to defendants' foregoing violations.

104. As a direct and proximate result of defendants' foregoing violation, Roche has suffered actual damages in

the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest, attorney's fees and court costs.

COUNT IX

(Conversion)

105. Plaintiff incorporates Paragraphs 1 through 104 herein as if fully set out.

106. Defendant converted the personal property of Roche in the manner described above, by dispossessing Roche from her property without her consent and against her interests; and by destroying or losing property of Roche; and by wrongfully withholding property.

107. The conversion of Roche's personal property is approximately $250,000.00, of which $160,000.00 is for replacement cost for items destroyed by exposure to the toxic mold spores, and the other loss of priceless sentimental and other items that could never be replaced, such as gifts, mementos, wedding memorabilia, and as described above.

WHEREFORE, the Plaintiff, Juanita Roche, requests judgment in the amount of Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) for conversion of her personalty.

COUNT X

(Intentional Infliction of Emotional Distress)

108. All above paragraphs are incorporated herein as if fully set out.

109. The defendants, jointly and severally, acted intentionally, or with such wanton disregard of the consequences of its action to amount to a conscious disregard for the rights of others.

110. The defendants purposefully inflicted emotional distress, or intended the above described conduct, and knew or should have known, that emotional distress would likely result.

111. This conduct described above was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality.

112. The defendants' conduct was the proximate cause of Roche's emotional distress.

113. Because the acts were intentional and/or done with reckless disregard of the rights of others, punitive damages should be awarded to deter these defendants and others from similar conduct in the future.

WHEREFORE, the Plaintiff, Juanita Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury, plus punitive damages according to law.

COUNT XI

(Negligent Infliction of Emotional Distress)

114. All above paragraphs are incorporated by reference as if fully set out.

115. Plaintiff Roche has suffered physical manifestations of injury, including aggravation of depression, anxiety, and neurological damage, as a result of the defendant's conduct.

116. These injuries were caused by defendant's negligence as described above.

WHEREFORE the Plaintiff, Juanita Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS

JUANITA ROCHE
By Counsel

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
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Virginia State Bar No. 9211

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Sept. 17, 2002]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, Defendants Lincoln Property Co. ("Lincoln"), INVESCO institutional ("INVESCO") and the State of Wisconsin Investment Board Investment Co. ("SWIB") (collectively referred to herein as "Defendants"), hereby remove to this Court a civil lawsuit filed by Christophe Roche in the Circuit Court of Fairfax County, Law No. 206874. Without admitting any of the allegations of the Complaint, Defendants' grounds for removing this action are as follows:

1. On or about August 22, 2002, Plaintiff filed a twelve-count Complaint against Defendants in the Circuit Court of Fairfax County (the "State Complaint").

2. In the State Complaint, Plaintiff alleges negligence per se (Count I), breach of lease (Count II), breach of implied warranties (Count III), breach of contract (Count IV), actual fraud/intentional misrepresentation (Count V), constructive fraud/negligent misrepresentation (Count VI), consumer fraud (Count VII), false advertising (Count VIII), tortious interference with contract by improper

methods (Count IX), conversion (Count X), intentional infliction of emotional distress (Count XI), and negligent infliction of emotional distress (Count XII). Plaintiff seeks compensatory damages and punitive damages of $100 million.

3. On August 30, 2002, Plaintiff's State Complaint was served (together with a summons) upon Defendants. See Ex. 1.[1] No other pleadings have been filed with the Circuit Court of Fairfax County.

4. This action is removable because if [*sic*] falls within the original diversity jurisdiction of this Court under 28 U.S.C. §§ 1332 and 1441(a). According to his Complaint, Plaintiff is a citizen of and is domiciled in the Commonwealth of Virginia.

5. Lincoln is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, Lincoln is a Texas corporation with its principal place of business in Texas.

6. INVESCO is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, INVESCO is a Delaware corporation with its principal place of business in Georgia.

7. SWIB is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. SWIB is an independent agency of the state of Wisconsin and, thus, a Wisconsin citizen.

8. Therefore, this case is removable by reason of diversity of citizenship because the amount in controversy is more than $75,000, exclusive of interest and costs, the parties are of diverse citizenship, and none of the

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[1] Exhibit 1, in accordance with 28 U.S.C. § 1446(a), includes all process, pleadings, papers, and Orders which have been served upon Defendants in the state court lawsuit that is being removed.

Defendants is a citizen or resident of the Commonwealth of Virginia. Accordingly, this Court has jurisdiction to hear the subject matter of this action pursuant to 28 U.S.C. § 1332.

9. The United States District Court for the Eastern District of Virginia, Alexandria Division, is the proper venue for the action pursuant to 28 U.S.C. § 1441(a), because it is "the district court of the United States for the district and division embracing the place where such action is pending."

10. All Defendants have joined in the removal of this matter from the Circuit Court of Fairfax County to the United States District Court for the Eastern District of Virginia, Alexandria Division.

11. This notice of removal has been timely filed within 30 days after the earliest service of a summons and complaint. See Murphy Brothers, Inc. v. Michetti Piper Stringing, Inc., 526 U.S. 344 (1999).

12. A copy of this notice of removal is being served upon Plaintiff through his counsel of record and with the Clerk of the Court for the Circuit Court of Fairfax County.

WHEREFORE, Defendants hereby remove to the United States District Court for the Eastern District of Virginia the lawsuit now pending against them in the Circuit Court of Fairfax County.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
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Counsel for Lincoln Property Co.

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Counsel for INVESCO and SWIB

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1389-A

JUANITA ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Sept. 17, 2002]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, Defendants Lincoln Property Co. ("Lincoln"), INVESCO institutional ("INVESCO") and the State of Wisconsin Investment Board Investment Co. ("SWIB") (collectively referred to herein as "Defendants"), hereby remove to this Court a civil lawsuit filed by Juanita Roche in the Circuit Court of Fairfax County, Law No. 206873. Without admitting any of the allegations of the Complaint, Defendants' grounds for removing this action are as follows:

1. On or about August 22, 2002, Plaintiff filed a twelve-count Complaint against Defendants in the Circuit Court of Fairfax County (the "State Complaint").

2. In the State Complaint, Plaintiff alleges negligence per se (Count I), breach of lease (Count II), breach of implied warranties (Count III), breach of contract (Count IV), actual fraud/intentional misrepresentation (Count V), constructive fraud/negligent misrepresentation (Count VI), consumer fraud (Count VII), false advertising (Count VIII), conversion (Count IX), intentional infliction of

emotional distress (Count X), and negligent infliction of emotional distress (Count XI). Plaintiff seeks compensatory damages and punitive damages of $100 million.

3. On August 30, 2002, Plaintiff's State Complaint was served (together with a summons) upon Defendants. See Ex. 1.[1] No other pleadings have been filed with the Circuit Court of Fairfax County.

4. This action is removable because if [*sic*] falls within the original diversity jurisdiction of this Court under 28 U.S.C. §§ 1332 and 1441(a). According to his [*sic*] Complaint, Plaintiff is a citizen of and is domiciled in the Commonwealth of Virginia.

5. Lincoln is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, Lincoln is a Texas corporation with its principal place of business in Texas.

6. INVESCO is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, INVESCO is a Delaware corporation with its principal place of business in Georgia.

7. SWIB is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. SWIB is an independent agency of the state of Wisconsin and, thus, a Wisconsin citizen.

8. Therefore, this case is removable by reason of diversity of citizenship because the amount in controversy is more than $75,000, exclusive of interest and costs, the parties are of diverse citizenship, and none of the Defendants is a citizen or resident of the Commonwealth of Virginia. Accordingly, this Court has jurisdiction to hear

[1] Exhibit 1, in accordance with 28 U.S.C. § 1446(a), includes all process, pleadings, papers, and Orders which have been served upon Defendants in the state court lawsuit that is being removed.

the subject matter of this action pursuant to 28 U.S.C. § 1332.

9. The United States District Court for the Eastern District of Virginia, Alexandria Division, is the proper venue for the action pursuant to 28 U.S.C. § 1441(a), because it is "the district court of the United States for the district and division embracing the place where such action is pending."

10. All Defendants have joined in the removal of this matter from the Circuit Court of Fairfax County to the United States District Court for the Eastern District of Virginia, Alexandria Division.

11. This notice of removal has been timely filed within 30 days after the earliest service of a summons and complaint. See Murphy Brothers, Inc. v. Michetti Piper Stringing, Inc., 526 U.S. 344 (1999).

12. A copy of this notice of removal is being served upon Plaintiff through his counsel of record and with the Clerk of the Court for the Circuit Court of Fairfax County.

WHEREFORE, Defendants hereby remove to the United States District Court for the Eastern District of Virginia the lawsuit now pending against them in the Circuit Court of Fairfax County.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
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(212) 801-9200

Counsel for INVESCO and SWIB

[certificate of service omitted]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CHRISTOPHE ROCHE, Plaintiff,	)	
v.	)	Law No. 206874
LINCOLN PROPERTY CO., INVESCO INSTITUTIONAL, and SWIB INVESTMENT CO., Defendants.	)	

[filed Sept. 18, 2002]

NOTICE OF FILING OF NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, on September 17, 2002, Defendants Lincoln Property Co., INVESCO Institutional and the SWIB Investment Co. filed a Notice of Removal for the above-referenced action with the Clerk for the United States District Court for the Eastern District of Virginia. A copy of the Notice of Removal is attached hereto.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
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New York, NY 10022
(212) 801-9200

Counsel for INVESCO and SWIB

[certificate of service omitted]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JUANITA ROCHE,
Plaintiff(s)

v. At Law No. CL-2002-0206873

LINCOLN PROPERTY CO., ET AL.,
Defendant(s)

FINAL ORDER

It appearing to the Court by the Notice of Removal received by this Court that this case has been removed to the United States District Court for the Eastern District of Virginia, Alexandria Division.

It is ADJUDGED and ORDERED that this cause is hereby REMOVED and stricken from the active docket of this Court.

ENTERED this 4th day of October, 2002.

/s/ STANLEY PAUL KLEIN
Circuit Court Judge

[Clerk stamp omitted]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CHRISTINE [*sic*] ROCHE,
Plaintiff(s)

v. At Law No. CL-2002-0206874

LINCOLN PROPERTY CO., ET AL.,
Defendant(s)

FINAL ORDER

It appearing to the Court by the Notice of Removal received by this Court that this case has been removed to the United States District Court for the Eastern District of Virginia, Alexandria Division.

It is ADJUDGED and ORDERED that this cause is hereby REMOVED and stricken from the active docket of this Court.

ENTERED this 4th day of October, 2002.

/s/ STANLEY PAUL KLEIN
Circuit Court Judge

[Clerk stamp omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (CMH)

CHRISTOPHE ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Oct. 8, 2002]

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

[text, signature block, and certificate of service omitted]

BEST AVAILABLE COPY

Westfield Village Apts
Apartment Lease Contract

Unit Number: 11104 **Unit Type..:** C1-1 **Lease Term :** 12 Months

1.	Current Date:	1. Friday, March 30, 2001
2.	Lessees/Residents Responsible for Lease (As defined in para. #1)	2. Christopher Roche & Juanita Castillo
3.	Address (See para. #2):	3. 5111 Woodmere Drive #104 Centreville, VA 20120
4.	**Commencement Date (See para. #2):**	4. **Sunday, April 1, 2001**
5.	**Ending Date (See para. #2):**	5. **Sunday, March 31, 2002**
6.	**Security Deposit Amount (See para. #3):**	6. **$300.00**
7.	**Monthly Rent (See para. #4):** **Prorated Rent (See para. #4):**	7. **$1,455.00** **$1,455.00**
8.	**Other (See para. #4):** **a. 10% late rent fee after the 5th of the month** **b. returned check fee**	8. **a. $145.50** **b. $30.00**
9.	**Rent Payable Management Office (See para. #4):**	9. **5115 Woodmere Dr. #103, Centreville, VA 20120**
10.	**Utilities Paid by Owner:**	10. **Refuse.**
11.	**Electricity Option (See para. #5):**	11. **Water/Sewer and Electricity paid by resident.**
12.	**Pro Rata Share (See para. #5):**	12. **N/A**
13.	**Occupants Only (See para. #6):**	13. **Roche, Christopher/Castillo, Juanita**
14.	**Resident's Name and Security Deposit Amount (See para. #7):**	14. **Deposit: 300.00** **Paid By: Christopher Roche and Juanita Castillo**
15.	**Early Termination Fee (See para. #8):**	15. **$1,455.00**
16.	**Pet Rent (See para. #17):**	16. **N/A**
17.	**Type of Pet(s) (See para. #17):**	17. **N/A**
18.	**Breed(s) of Pet(s) (See para. #17):**	18. **N/A**
19.	**Name(s) of Pet(s) (See para. #17):**	19. **N/A**
20.	**Color(s) of Pet(s) (See para. #17):**	20. **N/A**

21. **Emergency Release Representative (See para. #34)**

Resident Name:	Representative Name, Address:	Telephone:

22. **Special Provisions and Additional Agreements (See para. #34):**

Read and Accepted: _____ _____

1 THE PARTIES TO THIS LEASE (the "L ") are the owner of the Apartment (hereinafter referred to "Owner"), acting by and through its authorized agent, Lincoln Property Company (LPC) and the residents referenced on page one of this Lease (hereinafter referred to as "Resident").

2 Owner hereby leases to Resident the Apartment unit referenced on page one of this Lease (the "Apartment"), together with household furniture and furnishings, if any, described in the Furniture Inventory and Condition Form attached hereto as Exhibit "A" and made a part hereof. The Apartment is for use by Resident only as a private residence and not for any business or child care use, for a term commencing and ending as is referenced on page one of this Lease (the "Lease Term"). The Lease, subject to Owner's approval, may be renewed and the Lease Term extended by Resident by executing a Renewal Addendum. The Renewal Addendum shall have the same force and effect as the execution of a new lease. Unless another lease contract is signed by the parties which supersedes this Lease or a Renewal Addendum is signed, or unless a written notice of termination is given by either party at least forty-five (45) days prior to the end of the Lease Term, the Lease will be automatically renewed on a month to month basis with applicable month to month fees, during which time forty-five (45) days' written notice will be required in order for either party to terminate the Lease.

3 SECURITY DEPOSIT. Resident agrees that the Security Deposit set forth on page one of this Lease will be paid on or before the signing of the Lease. The Security Deposit is not advance Rent and cannot be applied to Rent by Resident. However, as provided in Paragraph 25 of the Lease, Owner may, under certain described conditions apply the Security Deposit toward Rent. Refunds of the Security Deposit shall be made in accordance with the terms of the Lease. A CONDITION TO THE REFUND OF THE SECURITY DEPOSIT IS THAT RESIDENT MUST PROVIDE OWNER WRITTEN NOTICE OF SURRENDER OF THE APARTMENT AT LEAST FORTY-FIVE (45) DAYS PRIOR TO THE EXPIRATION OR TERMINATION OF THE LEASE, OR ANY EXTENSION OR RENEWAL HEREOF.

4 **RENT. Resident(s) will pay rent per calendar month as is referenced on page one of this Lease (the "Rent"). Of the Rent, the amount set forth on page one of this Lease shall be allocated to furniture rental. Rent will be prorated from the date of move-in to the 1st day of the following month. Rent is due and payable in advance and without demand or offset at the Apartment Manager's office in the County referenced on page one of this Lease ON OR BEFORE THE 1ST DAY OF EACH MONTH. AFTER THE 1ST DAY OF THE MONTH THE RENT IS LATE, AND ALL REMEDIES IN PARAGRAPH 19 WILL BE APPLICABLE. Cash will not be accepted unless specifically authorized in writing in advance. At Owner's option, it may require that all Rent and other sums be paid in either cash, certified check, cashier's check or money order, and by one monthly payment rather than multiple payments. If Resident shall fail to pay any installment of rent within five (5) days of the date on which it is due and payable, Resident shall pay in addition to the rent, a late charge in the amount of ten percent (10%) of the rent due. The late charge is additional Rent. Acceptance of the Rent by Owner and anytime between the 1st and 5th day of the month is not a waiver of the due date for Rent. Resident's right to possession of the Apartment and all of Owner's obligations hereunder are expressly contingent on the timely payment of Rent. All monies received by Owner shall be applied first to non-rent items, then to Rent. RESIDENT WILL PAY A CHARGE OF $30.00 FOR EACH CHECK RETURNED TO OWNER BY A BANK OR OTHER ENTITY FOR ANY REASON. In the event that Owner receives two (2) non-sufficient fund ("NSF") checks, Owner may require that Rent and all other sums due be paid in either cash, certified check, cashier's check or money order.**

5 UTILITIES. Owner will pay for the utilities referenced on page one of the Lease; WHICH SHALL IN NO EVENT INCLUDE TELEPHONE. Resident shall pay for all other utilities. On or before move-in, Resident shall be responsible for notifying the appropriate utility companies for the purpose of placing said utilities in resident's name. Resident's failure to effect such change within three (3) days of move-in may result in Owner assessing as additional rent, resident's prorata utility charges together with a reasonable cost for determining such an assessment. Utilities shall be used only for ordinary household purposes and shall not be wasted by Resident. Owner reserves the right, at any time during the Lease Term, or any extensions or renewals thereof, to elect by giving Resident ten (10) days' written notice to either: (a) Require Resident to pay for all electricity consumed in the Apartment either directly to the utility company providing such electricity or by reimbursing Owner for the amount paid by said Owner to said utility company for such electricity so consumed in the Apartment. Resident shall independently contract and pay for all electricity consumed in the Apartment. Payment for electricity shall be made to Owner or said utility company, as the case may be, by Resident in accordance with monthly statements from the Owner or said utility company, which monthly statements shall be paid by Resident with the next month's Rent or as stated on the utility company bill. IN THE EVENT OWNER EXERCISES THIS OPTION, THE RENTAL AMOUNTS DUE FROM RESIDENT FOR EACH MONTH THEREAFTER SHALL BE REDUCED BY AN AMOUNT TO BE DETERMINED BY OWNER AT THE TIME SUCH OPTION IS EXERCISED; or (b) Require electricity be furnished to Resident on a submetered basis, at the expense of Resident. Charges for such electricity in each month or part thereof shall be computed by multiplying the number of kilowatt hours of electricity used by Resident times the per kilowatt hour rate paid by Owner for such month to the utility company furnishing such electricity. The bills which you will receive will be issued by Owner, not by the public utility company. The records and all electric meters in the Community shall be presumed to be correct for all purposes. Charges for such electricity shall be deemed to be "Rent" and are payable to Owner on the date stated in the bill, and Resident agrees that his covenant to pay such charges shall be a covenant independent of every other covenant of this Lease. The electric consumption for all Common Areas and common facilities will be paid for by Owner. Any dispute regarding the computation of Resident's bill or accuracy of the submetering equipment shall be between Resident and Owner. UPON COMMENCEMENT OF THE LEASE TERM, OWNER ELECTS TO EXERCISE EITHER OPTION (a) OR (b) AS INDICATED ON PAGE ONE OF THIS LEASE. In the event Owner elects to change the option referenced on page one of this Lease at any time during the Lease Term or extensions or renewals thereof, the option shall become effective on the first day of the month next following the expiration of the ten (10) day notice period. The amount of the reduction will remain constant throughout the remainder of the Lease Term and can be adjusted by Owner upon any renewals or extensions thereof. Resident shall have the right to make an examination of the Owner's utility bills for the Community for the purpose of verifying the accuracy of any statement furnished by Owner to Resident. Such examination shall be made and completed within fifteen (15) days after the statement with respect to which such examination pertains has been furnished to Resident, and shall be made at such times and such days as are reasonably convenient to Owner, after three (3) days' written notice to Owner requesting such examination. Owner further reserves the right, at any time during the terms hereof, or any extensions or renewals thereof, to elect by giving Resident ten (10) days' notice in writing of such election to require Resident to pay to Owner, as additional rent, Resident's Prorata Share (as hereinafter defined) of all water and gas consumed at the Community during each month or portion of a month during the Lease Term. Owner shall bill Resident monthly of Resident's Prorata Share of such water and gas costs for the prior month, which shall be paid by Resident with the next month's Rent. Resident's Prorata Share of such water and gas shall be adjusted for any partial month or occupancy on a per diem basis. Resident's Prorata Share shall be determined by multiplying the cost of all water and gas consumed at the Community (less the costs of water and gas attributable to the Common Areas) by a fraction, the numerator of which shall be the number of square feet in the Apartment and the denominator of which shall be the total number of square feet in all the apartments in the Community. It is hereby agreed and understood that Resident's Prorata Share shall be the percentage as referenced on page one of this Lease of the cost of all water and gas consumed at the Community. IN THE EVENT OWNER EXERCISES THIS OPTION, THE RENTAL AMOUNTS DUE FROM RESIDENT FOR EACH MONTH THEREAFTER SHALL BE REDUCED BY AN AMOUNT TO BE DETERMINED BY OWNER AT THE TIME SUCH OPTION IS EXERCISED. Owner has not, and cannot represent, warrant or covenant that the electricity rates now in existence shall continue in the future. Owner and Resident specifically agree that the responsibility of Resident to pay for electricity shall be unaffected by any rate increase and/or reclassification of Owner from one rate category to another rate category. Resident's failure to pay any electric, water or gas bill shall constitute a material violation of this Lease. The amount of any unpaid electric, water, or gas bill may be charged by Owner against Resident's Security Deposit. Residents will not allow electricity to be disconnected by any means, including the non-payment of bill, until the end of the Lease Term or renewal or extension period. Changes or the installation of utility lines, meters submetering or load management systems, and similar electrical equipment serving the Apartment shall be the exclusive right of Owner, provided such work is done in a reasonable manner and does not increase resident's utility costs.

6 THE APARTMENT WILL BE OCCUPIED ONLY BY THE ADULTS AND MINORS SPECIFIED ON PAGE ONE OF THIS LEASE. Those other than Resident will be referred to as "Occupants". Resident shall not sublet or assign the Lease and any attempt to do so without the prior written consent of Owner shall be void. Prior written consent of Owner is necessary in order to change Roommates. IF ROOMMATES ARE CHANGED WITHOUT THIS CONSENT, THE OLD ROOMMATE WILL REMAIN LIABLE FOR ANY DEFAULT INCLUDING THE PAYMENT OF RENT, BY THE NEW ROOMMATE.

7 MULTIPLE RESIDENTS. In the event more than one resident signs the Lease, each Resident is jointly and severally liable for all sums due under the Lease. The amount of any refund will be calculated without regard to who paid the Security Deposit and without regard to whose conduct resulted in any deductions

90

Read and accepted

therefrom. Security Deposits are collected for and remitted to the Owner by Lincoln Property Company , therefore, are a debt of Owner. Security Deposits are not necessarily held in trust by Owner. The Security Deposit shall be paid by the residents in the amounts set forth on page one of this Lease. Any refund of the Security Deposit due hereunder will be paid in proportion to the amounts paid as reflected on page one of this Lease in the event of more than one resident, and shall be made by one check jointly payable to all Residents.

8 EARLY TERMINATION. Resident may terminate the lease prior to the expiration of the lease term only based upon a job transfer of resident to a different geographic area, provided that resident provides landlord with verification of job transfer from employer at the time notice is given, and provided that resident is not in default hereunder at the time of giving notice, and agrees to strictly comply with the following terms: (a) To give Owner 45 days written notice; (b) to pay Owner all monies due through the date of termination; (c) to pay an amount set forth on page one of this Lease, as consideration for early termination; and (d) to pay a prorated portion which shall be included in the early termination fee, for make-ready expenses, such as shampooing carpet, repainting and cleaning based on the ratio of the number of months remaining in the initial term to the number of months in the original Lease Term. The foregoing shall not release Resident of any responsibilities and obligations regarding damage to the Apartment.

9 RESIDENT ACCEPTANCE. Within forty-eight hours of receipt of a Move-In Condition Form (MIC), attached hereto as Exhibit "B", and made a part hereof, Resident agrees to report to Owner in writing any such discrepancies between the information described in the MIC and the actual condition of the apartment. Owner shall then amend such form to correct such discrepancies. Resident's failure to report any defects or problems with the Apartment in writing within such time is and shall be a binding admission of the accuracy of such form. Any such written report from Resident is not and shall not constitute a written request for repairs within the meaning of Paragraph 15. OWNER MAKES NO IMPLIED WARRANTIES. IN PARTICULAR, OWNER DISCLAIMS AND EXCLUDES ANY WARRANTY THAT THE PREMISES AND ITS CONTENTS ARE FIT FOR ANY PARTICULAR PURPOSE OR ARE MERCHANTABLE. Owner will initially furnish light bulbs for the Apartment; thereafter, light bulbs will be replaced by Resident at Resident's expense. Resident accepts the Apartment subject to any existing or future recorded mortgage, deed of trust, or other lien applicable to the Apartment or its contents. The Apartment and all other areas which are reserved for Resident's private use shall be kept reasonably clean and sanitary by Resident. No alterations, improvements, painting, installations of antenna, telephone, computer, cable television outlets or dryer outlets will be permitted without the prior written consent of Owner. Resident may not change shower head devices, place water furniture, washers, dryers or similar appliances in the Apartment or otherwise alter the Apartment, its contents, fixtures or equipment of the Community without the prior written consent of Owner. A reasonable number of small holes in sheetrock walls and in the grooves of wood paneling will be allowed to hang pictures. Resident shall not duplicate keys to the Apartment or remove Owner's fixtures, equipment, security devices, electronic alarm system, furniture or furnishings from the Apartment for any reason. Upon the termination of the Lease for whatever cause, Resident covenants and agrees to promptly and peacefully vacate and surrender possession of the Apartment to Owner and promptly and peacefully surrender and deliver to Owner all of the personal property belonging to Owner, including, but not limited to, all those items of furniture and furnishings, if any, listed on Exhibit "A", in the same condition as when received, except for reasonable wear and tear.

10 NOTICE REQUIREMENT. All notices by Residents to Owner or its representatives including, but not limited, to notices: (a) requesting the name and address of Owner or LPC; (b) requesting the installation, change, rekeying or removal of a security device; (c) of malfunction of a smoke detector; (d) requesting installation, inspection or repair of a smoke detector; or (e) requesting repairs in accordance with Paragraph 14 hereof, shall be in writing and delivered to the location where Rent is to be paid. All notices by Owner, its agents and legal representatives to Resident shall be delivered to the Apartment or to such other address as Resident may designate by written notice to Owner. Unless otherwise agreed in writing between Owner and Resident, Owner, or its representatives may give resident notice by firmly affixing same to the Apartment door.

11 COMMUNITY POLICIES. Resident, Occupants, guests, invitees and others present at the Community with Resident's consent shall comply with all written Community policies which shall be considered part of the Lease and Owner may make policy changes if in writing and given to Resident. All such policies may be enforced through Owner's agents or legal representatives, and Resident shall hold same harmless for reasonable enforcement thereof. Resident may not operate any type of business or conduct any commercial activity in or from the Apartment. Garbage shall be disposed of only in designated receptacles. All parking lots, driveways, walkways, landscaped areas, laundry rooms, recreational areas, and other areas and facilities available for common use by Residents (the "Common Areas") are subject to Owner's exclusive control. Sidewalks, steps, outside hallways, entrances, walkways and stairs shall not be obstructed in any way or used for any purpose other than ingress or egress. Owner may impose such specific restrictions on resident's use of the Common Areas as it deems appropriate by giving notice by sign, letter or other means to residents, and violation of any such restrictions shall be a default by Resident. The Common Areas are to be used solely at the risk of the person using them. Owner may regulate or prohibit from the Apartment or Community motorcycles, mopeds, bicycles, tricycles, skateboards, roller skates, trampolines, exercise equipment, recreational vehicles, boats, trailer or inoperable vehicles. Resident shall not cause or permit the display of any sign or advertising matter which is visible outside the Apartment or is on the Common Areas or otherwise in the Community, without the Owner's prior written consent. Owner reserves the right to control the entry upon the Community by Resident's guests, agents, licensees or invitees, furniture movers, delivery persons, solicitors and/or salespeople. Owner may prohibit from the Apartment or Community guests or invitees who, in Owner's reasonable judgment, have been disturbing the peace, disturbing other residents, or violating Community policies. Resident, Occupants, guests, invitees and others present at the Community with Resident's consent shall not be disorderly, boisterous or unlawful, or disturb the peace or the rights and privileges of other residents, or permit any unlawful activities or any act or practice which will injure the reputation of the community. In the event Resident violates any law or Community policy, Resident shall be subject to the remedies provided for in Paragraph 19 herein.

12 LIABILITY. OWNER AND OWNER'S REPRESENTATIVES WILL NOT BE LIABLE FOR DEATH OR LOSSES OR DAMAGES TO PERSON OR PROPERTY OF RESIDENT, RESIDENT'S GUESTS OR OCCUPANTS CAUSED BY THEFT, BURGLARY, RAPE, ASSAULT, BATTERY, ARSON, MISCHIEF OR OTHER CRIME, VANDALISM, FIRE, SMOKE, WATER, LIGHTNING, RAIN, FLOOD, WATER LEAKS, HAIL, ICE, SNOW, EXPLOSION, SONIC BOOM, INTERRUPTION OF UTILITIES, ELECTRICAL SHOCK, DEFECT IN ANY OF THE CONTENTS OF THE APARTMENTS, LATENT DEFECT IN THE COMMUNITY, ACTS OF GOD, OTHER UNEXPLAINED PHENOMENA, ACTS OF OTHER RESIDENTS OR ANY OTHER CAUSE OTHER THAN THE GROSS NEGLIGENCE OF OWNER OR ITS REPRESENTATIVES ACTING IN THE COURSE AND SCOPE OF EMPLOYMENT. Resident will indemnify and hold harmless Owner and Owner's representatives for any liability, including costs and attorneys' fees, due to death, loss or damage to the person or property of resident, Occupants, guests, invitees or others present in the Apartment or at the Community with Resident's consent from any cause other than Owner's gross negligence or that of its representatives acting in the course and scope of employment, and from any liabilities arising as the result of the acts of Resident, Occupants, or others present with Resident's consent. OWNER AND ITS REPRESENTATIVES ARE NOT INSURERS. OWNER STRONGLY RECOMMENDS THAT RESIDENT SECURE INSURANCE TO PROTECT AGAINST ALL OF THE ABOVE CIRCUMSTANCES. Owner shall have no duty regarding security at the Community other than to make necessary repairs to security devices as provided in Paragraph 14. Resident acknowledges that Owner is under no obligation or duty to inspect, test, or repair any security device unless and until Owner has received written notice from Resident, except when the Lease Term begins and in the case of a smoke detector, when a new detector is installed by Owner. RESIDENT UNDERSTANDS THAT OWNER HAS RETAINED AN INDEPENDENT COMPANY TO PROVIDE A PATROL SERVICE WHICH IS AVAILABLE FOR DISTURBANCES, FIRE LANE VIOLATIONS, PROBLEMS WITH OUTDOOR LIGHTING AND PROBLEMS OF THAT TYPE. IN THE EVENT OF CRIMINAL ACTIVITY, THE POLICE DEPARTMENT IS TO BE CONTACTED FIRST BY RESIDENT. RESIDENT AGREES AND UNDERSTANDS THAT THE PATROL SERVICE IS NEITHER A POLICE FORCE NOR A GUARANTEED DETERRENT TO CRIME. Resident understands and agrees that Owner may alter or cancel the patrol service without his knowledge or consent. Further, Resident understands and agrees that Owner has no obligation or liability for the acts or omissions, whether negligent, intentional or otherwise, of any agent or employee of the patrol company or of any patrol company subsequently retained by Owner. RESIDENT UNDERSTANDS THAT CRIMES AGAINST PERSONS ARE PREVALENT, ESPECIALLY IN APARTMENT COMMUNITIES, and recognizes that Owner and its legal representatives are not insurers. Resident understands that Owner and its legal representatives do not guarantee, warrant or assure resident's personal security and are limited in their ability to provide protection. RESIDENT UNDERSTANDS THAT THE PROTECTIVE STEPS OWNER HAS TAKEN ARE NEITHER A GUARANTEE OR WARRANTY THAT THERE WILL BE NO CRIMINAL ACTS OR THAT RESIDENT WILL BE FREE FROM THE VIOLENT TENDENCIES OF THIRD PERSONS. RESIDENT HAS BEEN INFORMED AND UNDERSTANDS AND AGREES THAT HIS PERSONAL SAFETY AND SECURITY IS HIS PERSONAL RESPONSIBILITY. In particular, resident recognizes that it is more reasonable for each individual to determine what risks of

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loss are foreseeable and to protect again ch losses. Resident, therefore, agrees that it shall be his res, ability to obtain insurance to protect against Resident's losses and to take all other lawful and reasonable steps to protect his safety. Resident recognizes that Owner's efforts are voluntary and not obligatory and are done in an effort to reduce the threat of crime in the Community. Resident agrees that the furnishing of the safety devices and patrol service will not constitute a guarantee or warranty of their effectiveness or impose any obligation on Owner to continue them. Resident, therefore, hereby releases Owner, Agent and their respective agents, officers, directors, owners, partners, employees, employers and their legal representatives from any claim whatsoever with respect to any personal injury, property damage or death from the criminal acts of third persons or which is in any way related either to Resident's reliance on safety devices and patrol service mentioned above or to any defect, malfunction or inadequacy thereof. Resident will inspect the security devices and will be given the opportunity to make comments on their condition on Exhibit "B". These comments do not constitute a written request for repair as required by the Lease. Owner will make needed repairs of same only upon written request of Resident. Owner shall have no duty to furnish alarms of any kind, security guards, or additional security devices. Resident shall pay for and replace smoke detector batteries, and shall pay for monthly service on the electronic alarm system, if any, unless otherwise provided on page one of the Lease. Upon written request and payment of material costs, Owner will change or install additional locks. If Resident installs additional security devices, Owner shall be given the keys, codes or operating device immediately upon installation. Any notices or requests by Resident for inspection, installation or repair of security devices or smoke detector shall be in writing. If owner's representatives are requested to render services not contemplated by their employment contract, such as moving vehicles or furniture, cleaning, or delivering or accepting deliveries, such representative shall be deemed the agent of the Resident regardless of whether payment is arranged for such service; and Resident agrees to and does hereby release, indemnify and hold harmless Owner and its representatives from all liability regarding same. IMPORTANT: RESIDENT UNDERSTANDS AND AGREES THAT OWNER, ITS AGENTS, SERVANTS, EMPLOYEES AND LEGAL REPRESENTATIVES ARE LIMITED IN THEIR ABILITY TO PROTECT RESIDENT, RESIDENT'S OCCUPANTS, GUEST AND INVITEES FROM CRIME, ACCIDENT, OR NATURAL CATASTROPHE AND THAT RESIDENT IS BETTER ABLE TO EVALUATE INDIVIDUAL RISK AND LOSS AND OBTAIN INSURANCE TO PROTECT AGAINST SUCH EVENTS. RESIDENT THEREFORE AGREES THAT OWNER'S LIABILITY AND THAT OF ITS AGENTS AND LEGAL REPRESENTATIVES IS LIMITED TO THAT EXPRESSED IN THIS LEASE.

13 RESIDENT AGREES TO PAY TO OWNER WITHIN FIVE (5) DAYS after the demand the amount of any loss, property damage, or cost of repairs or service incurred by Owner, including damages from windows or doors left open, which is caused intentionally, negligently or by the improper use of the Apartment, Common Areas or the Community by Resident, Occupants, guests, invitees, pets or others at the Community with Resident's consent. Resident shall be responsible for all plumbing stoppages occurring in lines exclusively serving the Apartment, and damage to doors, windows or screens, unless due to the gross negligence of Owner or its representatives. Owner's delay in demanding damage reimbursements, late-payment charges, returned check charges or other sums due by Resident shall not be deemed a waiver of these charges; and Owner may demand same at any time (including at move-out); or Owner may deduct same from the Security Deposit. The rights and remedies of Owner under this Lease are cumulative, and the use of one or more thereof shall not exclude or waive the right to the use of any other remedy.

14 REPAIRS AND MALFUNCTIONS. RESIDENT SHALL PROMPTLY REQUEST, IN WRITING, ANY REPAIRS TO BE MADE TO THE APARTMENT OR ITS CONTENTS, FIXTURES, SECURITY DEVICES AND OTHER EQUIPMENT, ETC., WHICH BELONG TO OWNER, THAT ARE NECESSARY TO MAINTAIN IN PROPER CONDITION. EXCEPT IN CASE OF EMERGENCY WHEN ORAL REQUESTS TO THE MANAGEMENT OFFICE ONLY WILL BE ACCEPTED. In case of malfunctions of equipment, fixtures, security devices or utilities, or damage by fire, water or other cause, Resident shall notify Owner immediately. Owner shall, upon actual receipt by owner of such written (or oral, if authorized) request, act with reasonable diligence in making such repairs and the Lease shall continue and the Rent shall not abate during such period; provided, however, that Owner may require resident to pay any money due pursuant to paragraph 14 in regard to such repairs prior to making them. Should the Apartment, in Owner's sole discretion, become unfit for occupancy, Owner may refuse to repair and, by giving written notice, terminate the Lease. Owner may temporarily turn off equipment and interrupt utilities to avoid damage to property or to perform maintenance requiring the same.

15 WHEN OWNER MAY ENTER. Permission to enter or request for services from any resident shall be deemed to be from all residents. If resident, Resident's guests or Occupants are present, then Owner and its representatives or servicemen may enter the Apartment during reasonable times for any reasonable business purpose. Otherwise, Owner and its representatives or servicemen may enter by key, or by other means if locks have been installed which violate the terms of Lease, without notice to Resident if it is impractical to do so in case of emergency for the following purposes: repairs, extermination, maintenance, emergency safety or fire inspections, leaving notices, retrieving property, preventing waste of utilities, removing unauthorized locks, latches, or window coverings, and showing the Apartment to building inspectors, fire marshals, lenders, prospective purchasers, or insurance agents, or to prospective residents after notification of move-out or lease termination has been given. During any emergency, Owner or its representatives may forcibly enter the Apartment. Where the Apartment has been equipped with an electronic alarm system approved by Owner, the Owner and its representatives shall have the right to turn the system off to enter the Apartment and shall have the right to enter and allow the alarm to sound, for the above described purposes and Resident shall hold Owner and its representatives harmless for all personal property damage, death, injury or loss sustained or suffered by Resident, Resident's guests, invitees or Occupants on account of such entry by such persons for the above described purposes.

16 PETS. **Resident will not permit any pet or animal, even temporarily, anywhere in the Apartment or the Community without prior written consent of Owner. The presence of a pet or animal without such consent shall constitute a breach of a material condition hereof. Resident agrees to pay such additional rent as specified on page one of this Lease and to pay any increased Security Deposit for any pets permitted by Owner. Any such increased Security Deposit shall be considered as a general Security Deposit for any and all purposes, and refund of such deposit shall be subject to all of the terms and conditions set forth in this Lease. THE INCREASED SECURITY DEPOSIT IS NOT REFUNDABLE PRIOR TO SURRENDER OF THE APARTMENT, EVEN IF THE PET HAS BEEN REMOVED. It is understood and agreed by Resident that any expenses incurred by Owner or its representatives, including cleaning of carpet, in the extermination of fleas and ticks in the Apartment after termination of the Lease are recoverable by Owner from Resident and are not considered normal wear and tear. Resident agrees to pay Owner's cost for the extermination of fleas and ticks in the Apartment. In the event Owner agrees to permit Resident to have a pet in the Apartment Community, Resident agrees (a) to pay, as additional rent, an amount set forth on page one of this lease ("Pet Rent") per month per pet, not to exceed two pets; (b) that only the Pet(s) described and named on page one of this Lease will occupy the Premises and that no additional or different pet is authorized under the Lease; (c) that the pet will be kept inside the Apartment at all times except when on a leash and accompanied by and under the control of Resident; (d) that if the pet becomes annoying, bothersome, or in any way a nuisance to other residents or to the apartment operation, resident will immediately upon notice from the Owner remove the pet from the Premises or vacate the Apartment; and (e) that the pet will not exceed twenty-five (25) pounds in weight when full grown.**

17 RESIDENT SHALL NOT vacate the Apartment at any time without prior payment of all sums due or to become due for the entire Lease Term and any extensions or renewals thereof, nor shall resident be absent from the Apartment for any seven (7) consecutive days while any money is due to Owner. If Resident is absent from the Apartment for any seven (7) consecutive days during the Lease Term or any renewal or extension period while all or any portion of the rent is delinquent, the Apartment may be deemed abandoned.

18 DEFAULT BY OWNER. Owner agrees to act with reasonable diligence to: (a) keep Common Areas of the Community reasonably clean; (b) maintain fixtures, furniture, hot water, heating and/or air conditioning equipment; (c) remain in substantial compliance with applicable state and local laws regarding safety and sanitation; and (d) make all reasonable repairs, subject to Resident's obligation to pay for damages caused by Resident, Resident's guests, invitees or other Occupants. Resident may terminate the Lease for violation of the foregoing by Owner only after the following procedures have been followed: (a) resident shall make written request for repair or remedy of the condition, and all rents must be current at such time; (b) after receipt of such request, Owner shall have reasonable time to repair, considering the nature of the problem and the reasonable availability of materials, labor, and utilities; (c) if such reasonable time has lapsed and if owner has not made a diligent effort to repair, Resident shall then give Owner written notice of intent to terminate the Lease unless the repair is made within seven (7) days; and (d) repair has not been made within such seven (7) day period. In the event the Lease is terminated pursuant to this paragraph, Resident's Security Deposit and prorated Rent will be refunded as required by law.

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19 DEFAULT BY RESIDENT. If Resident fails to pay rent or other lawful charges when due, including reimbursement for damages, repairs or plumbing service costs or if resident, resident's guest, invitees or other Occupants violate the covenants or conditions of the Lease or the community policies of Owner or its representatives, or applicable federal, state and local laws, or if Resident abandons the Apartment, then Owner may (with or without demand for performance) terminate resident's right of occupancy by giving resident written notice to vacate as required by law; and Owner shall be entitled to immediate possession by eviction suit. Notice may be given by mail or personal delivery to Resident or Resident's Apartment. Personal delivery to the Apartment may consist of affixing the notice upon any door leading into the Apartment. TERMINATION OF POSSESSION RIGHTS OR SUBSEQUENT RELETTING BY OWNER SHALL NOT RELEASE RESIDENT FROM LIABILITY FOR FUTURE RENT UNDER THIS LEASE. After Owner gives notice to vacate or after Owner files a petition for eviction, Owner may still accept rent or other sums due without waiving or diminishing Owner's right of eviction. Acceptance of monies at any time will not waive Owner's right to collect from resident for property damage, past or future Rent or other sums due. IN THE EVENT OF TERMINATION, OWNER MAY RELET THE APARTMENT, and if relet, any payments made after reletting shall be credited against sums due from Resident under this Lease. If Owner diligently attempts to relet the Apartment prior to the end of the Lease Term, Resident shall be liable, regardless of whether reletting attempts are successful for all costs incurred by Owner in placing the Apartment in condition to be relet, including, but not limited to, its administrative expenses which Owner and resident agree to be $50.00. Resident expressly agrees that any such costs shall not be deemed to be attributable to normal wear and tear. Such amount shall be due at move-out and shall satisfy Resident's liability for the above costs of reletting, but it will not satisfy or terminate Resident's liability for past due Rent, future Rent, cleaning, repairing, lock changes or other sums due under the Lease. Owner may report unpaid Rent, other sums due and/or NSF or returned checks to any local credit bureau or other similar collection or credit reporting service for permanent recordation in Resident's credit record. In any lawsuit involving contractual or statutory obligations of Owner or its representatives or Resident, the prevailing party shall be entitled to recover attorneys' fees and all other costs of litigation from the non-prevailing party. All amounts in any lawsuit judgment shall bear the highest lawful interest from due date until paid.

20 ACCELERATION. ALL MONTHLY RENT FOR THE REMAINDER OF THE LEASE TERM OR EXTENSION PERIOD SHALL BE ACCELERATED AUTOMATICALLY WITHOUT NOTICE FOR DEMAND AND SHALL BE IMMEDIATELY DUE AND DELINQUENT IF: (1) RESIDENT MOVES OUT, REMOVES PROPERTY IN CONTEMPLATION OF MOVING OUT OR GIVES NOTICE (IN PERSON OR BY AGENT) OF INTENT TO MOVE OUT PRIOR TO THE END OF THE LEASE TERM OR RENEWAL OR EXTENSION PERIOD AND (2) RENTALS FOR THE ENTIRE LEASE TERM AND RENEWAL OR EXTENSION PERIOD HAVE NOT BEEN PAID IN FULL. REMAINING RENTS SHALL LIKEWISE BE ACCELERATED IF RESIDENT IS EVICTED BY COURT ORDER. SUCH RIGHT OF ACCELERATION IS IN LIEU OF HAVING RENT FOR THE ENTIRE LEASE TERM PAYABLE AT THE BEGINNING OF THE LEASE.

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21 HOLDOVER. If Resident holds over and fails to move-out on or before the date required under the Lease, Resident shall be liable to pay triple rents for the holdover period and to indemnify Owner and/or prospective residents for damages incurred (including, but not limited to, lost Rent, lodging expenses and attorneys' fees) and at Owner's option, Owner may extend the lease term for one month by delivering written notice to Resident or the Apartment while resident is still holding over. Holdover Rents shall be immediately due on a daily basis and delinquent without notice or demand.

22 In order to clear an abandoned apartment, Owner and its representatives may enter the Apartment and remove and store all property of every kind found therein. Resident shall be liable for reasonable costs incurred by Owner and its representatives for packing, removing or storing property which has been abandoned, removed by agreement, seized under contractual lien or removed pursuant to court order. Owner and its representatives may sell seized property at public or private sale (subject to any recorded chattel mortgage) ten (10) days after written notice of the time and place of sale is sent by certified mail to Resident. Proceeds of the sale shall be first credited to the cost of sale, including storage costs, and then to Resident's indebtedness to Owner. Any surplus shall be mailed to Resident at the address to which the notice of sale was directed. None of the above procedures shall require prior court hearing. Resident releases and agrees to hold Owner and its representatives harmless from any claim or liability arising out of Owner's exercise of the lien rights granted by statute or by this paragraph.

23 RELEASE OF RESIDENT. Resident will not be released from the Lease on the grounds of voluntary or involuntary school withdrawal or transfer, voluntary or involuntary business transfer, layoff or termination, marriage, divorce, marriage reconciliation, loss of co-residents, bad health, death or any other reason, except as provided in Paragraph 8 or in the event of verification of enlistment or transfer in the armed services.

24 MOVE OUT PROCEDURES. Resident must give to Owner or Owner's representative written notice of intent to vacate at least forty-five (45) days prior to the last day of the Lease Term and any renewal or extension period. Verbal notice of termination will not be accepted. If Resident moves from the Apartment prior to the last day of the Lease Term, or any renewal or extension period, Resident shall be in default and subject to Paragraph 20 hereof. A Resident who moves out prior to the end of the lease term is no longer entitled to occupancy or keys. Return of the Security Deposit will be governed by the terms of this Lease. Prior to vacating the Apartment, Resident agrees to comply with the terms of Owner's Move-Out Instructions, and to otherwise leave the Apartment in the same condition as when leased, except for ordinary wear and tear and damages which Owner is required by Paragraph 15 to repair at its expense. The Apartment, including furniture, bathrooms and kitchen appliances must be cleaned thoroughly. After Resident vacates the Apartment, Owner or its representative will inspect the Apartment with the Move-Out Condition Walk Sheet and Owner's written Move-Out Instructions. Owner and its representative shall not be responsible for personal property which may be left at the Community after Resident has left the Apartment nor shall Owner and its representative be liable to Resident for any loss or damage to such property.

SECURITY DEPOSIT

25 DEDUCTIONS. Prior to refund, deductions may be made from the Security Deposit for the following items (a) a cleaning charge which shall be $50.00 for an efficiency and one (1) bedroom apartment, $60.00 for a two (2) bedroom apartment and $70.00 for three (3) bedroom apartment. Owner and resident agree that this amount is a reasonable estimate of the actual cost which Owner will incur and agree to be bound thereby and agree that such amount shall not be deemed attributable to normal wear and tear of the Apartment; (b) Owner's actual expenses for damages beyond normal wear and tear to the Apartment or its contents, including the electronic alarm system, if any, other than those related to repairs required by the Lease to be at Owner's expense; (c) Damages resulting from Resident's breach of Paragraph 9 of the Lease; and (d) Any other unpaid sums due to Owner under the terms of the Lease, including but not limited to late charges, returned checks, NSF check charges, bank service charges, service charges for which Owner has not been reimbursed, insufficient light bulbs, utilities for repairs, removal of illegally parked vehicles, unpaid damage claims, administrative costs, charges for removal of unauthorized locks, agreed costs of reletting, charges for removing, packing and storing abandoned, seized or lawfully removed property, attorneys' fees, court costs, charges for Owner's time and inconvenience in any valid eviction proceeding against Resident, unpaid utility charges, Rent and other lawful deductions. Charges may be made for change of door locks and new keys in the event Resident does not return keys or Rent has been accelerated under Paragraph 20 of the Lease or Resident has been evicted. Security Deposits will be first applied to non-rent items, then to unpaid rent. If lawful deductions exceed the total amount of deposits, Resident shall pay such excess amount upon written demand by Owner.

26 CONDITIONS FOR REFUND. After deduction of the items in Paragraph 25 above, if any, the balance of the Security Deposit(s), together with an itemized accounting of any deductions will be mailed to Resident no later than forty-five (45) days after surrender of the Apartment by ALL Residents who have signed the Lease. PROVIDED, THE FOLLOWING CONDITIONS ARE MET BY RESIDENT: (a) AT LEAST FORTY-FIVE (45) DAYS' WRITTEN NOTICE OF INTENT TO SURRENDER MUST BE GIVEN TO OWNER OR ITS REPRESENTATIVES PRIOR TO THE ENDING DATE OF THE LEASE TERM, RENEWAL OR EXTENSION PERIOD. VERBAL NOTICE WILL NOT SATISFY THIS CONDITION UNDER ANY CIRCUMSTANCES. THIS ADVANCE WRITTEN NOTICE OF INTENT TO SURRENDER IS A CONDITION TO REFUND, IN WHOLE OR IN PART OF, THE SECURITY DEPOSIT. (b) Resident must furnish Owner or its representatives with a written copy of Resident's forwarding address or addresses. Owner's representatives have no authority to estimate or commit to the amount or the deductibility of repairs, damages or charges prior to mailing of the itemized accounting.

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27 **SURRENDER.** For purposes of det ing relinquishment of possession, damages, clean-up c s and other deductions, "surrender" shall occur when (a) all Residents who signed the Lease live elsewhere and the move-out date has expired, (b) all keys have been turned in, or (c) when it reasonably appears that all Residents have permanently moved out and do not intend to return, whichever comes first.

MISCELLANEOUS

28 **FAILURE TO PAY FIRST MONTH'S RENT.** If Resident fails to pay the first month's Rent by the first day of the first rental period under the Lease, all future Rents may be accelerated and immediately due and payable. In addition, Owner may terminate Resident's right of occupancy and sue for damages, future rentals, attorneys' fees, court costs and other lawful charges.

29 **EMINENT DOMAIN.** In the event the Apartment is taken through the exercise of the power of eminent domain, the monthly Rent shall be paid by Resident to the date of ouster in the eminent domain proceedings at which time the Lease shall terminate. In the event of such taking, the entire award for damage to the Apartment, both leasehold and reversion, shall be the sole property, right and cause of cation of the Owner and Resident hereby assigns and conveys to Owner all of Resident's right, title and interest in and to any joint award made pursuant to any such proceedings. Resident hereby authorizes and empowers Owner in the name of the resident to pursue such remedies as may be available to Owner to receive such award for damages, and to make, execute and deliver in Resident's name any release or other instrument that may be required to recover such award or judgment.

30 **GENERAL. NO ORAL AGREEMENTS HAVE BEEN ENTERED INTO BETWEEN THE PARTIES. THIS LEASE IS THE ENTIRE AGREEMENT.** In particular, no statement of Owner or its representatives shall modify, change, add or delete provisions of this Lease unless in writing. In the event of more than one Resident, each resident is jointly and severally liable for each provision of the Lease, and notice to one Resident shall constitute notice to all Residents. Violation of the Lease by Resident, Resident's guests or Occupants shall be considered a violation by all Residents. Further, all demonstrations, inspections and explanations made by Owner or its representatives to one of the Residents of the Apartment shall be binding on all Residents of the Apartment with the same force and effect as if made to each of them. All obligations hereunder are to be performed in the county where the community is located. If Owner is unable to give resident possession of the Apartment at the agreed date for any reason, including construction, holdover, etc., Owner shall not be in default hereunder nor be liable to resident as a result of such delay, and the Lease shall remain in force subject to the following: (1) Rent shall be abated on a daily basis during such delay, and (2) Resident may terminate by giving written notice to Owner upon at least five (5) days written notice to Owner, whereupon Resident shall be entitled only to a refund of the Security Deposit and prepaid rent. Resident's right of abatement or termination shall not apply to cleaning or repair delays which do not prevent occupancy by Resident. All of Resident's statements in the rental application were relied upon by Owner in execution of the Lease. Resident may not withhold Rent or offset against Rent. In the event the Lease is executed prior to approval of Resident's rental application by Owner, the Lease shall not become effective until Owner has either tendered the Apartment to Resident or approved resident's application(s) in writing. Any clause of the Lease declared invalid by law shall not invalidate the remaining clauses in the Lease. It is specifically understood and agreed between the parties hereto that any obligation of Owner to pay money or other consideration to Resident shall be satisfied solely from the Owner's estate and interest in the property of which the Apartment is a part, or the proceeds thereof, and Resident covenants and agrees that only such financial interest will be pursued for the satisfaction of any remedy which Resident may have for the collection of money or other consideration from Owner by judicial process or otherwise.

31 **LINCOLN PROPERTY COMPANY'S STATUS.** Important: Read this Section carefully. It is specifically understood and agreed that LPC acts only as Agent for Owner. Responsibility for all obligations of Owner, including Security Deposits, rests entirely on such Owner. Resident agrees that LPC may exercise and shall have all of the rights, powers and benefits of Owner hereunder.

32 **THIS CONTRACT** may be executed in multiple copies. Omission of initials on any page of this Lease does not invalidate the Lease. A copy of Owner's Community policies will be furnished when Resident moves in, or earlier if requested.

33 **SPECIAL PROVISIONS OR ADDITIONAL AGREEMENTS:** In the event of an emergency, death, or illness involving Resident, Resident hereby authorizes Owner or its representatives to give Resident's key and release of all resident's possessions to the representative designated on page one of this Lease subject to Owner being directed otherwise by a Probate or other court of law. During the Lease Term or during any renewal or extension thereof, upon thirty (30) days' written notice to Resident.

34 Owner may increase the Rent. If Owner reasonably determines that the expenses fairly allocable to the Apartment for capital improvements to the Community, property taxes, utilities, charges for municipal services, insurance, or operating and maintenance expenses have increased by at least the amount of the rental increase, but in no event shall such increase exceed fifteen percent (15%) during the Lease Term. Owner reserves the right to increase Rent for reasons other than specified herein above upon forty-five (45) days' written notice to Resident, in which event Resident shall have an opinion to terminate the Lease by giving Owner written notice of termination within seven (7) days after receipt by the Resident of the aforesaid notice of Rent increase. In the event of termination by Resident, such termination shall be effective on the date of the scheduled Rent increase. Other provisions, if any, shall be set forth on page one of this Lease.

35 **HAZARDOUS SUBSTANCE.** Residents shall use no hazardous substance or hazardous materials in or around the apartment except for normal household cleaning products which will be used and stored in a manner consistent with such household use, and Residents shall dispose of such cleaning products in accordance with all applicable laws.

36 **THIS IS A BINDING LEGAL DOCUMENT. READ ENTIRE CONTRACT, WHICH CONSISTS OF PARAGRAPHS 1-34, EXHIBITS "A" and "B", AND ANY ADDENDA ATTACHED HERETO, CAREFULLY BEFORE SIGNING BELOW AND INITIALING ALL PAGES ATTACHED HERETO.**

Resident(s) _____ Date 03-30-01

_____ 03-30-01

_____ _____

_____ _____

OWNER: SWIR

By: LINCOLN PROPERTY COMPANY ECW, INC. AGENT
3500 Lincoln Plaza
500 North Akard
Dallas, Texas 75201-3394

By: _____

(Lincoln Property Company Agent)

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BEST AVAILABLE COPY

Lease Addendum
Westfield Village

Residents(s):	Christophe Babe + Juanita Castillo
Address:	5111 Woodmere Drive # 104
	Centreville, Virginia 20120

Early Termination Addendum: Resident may terminate the lease, prior to the expiration of the lease term, provided that the resident is not in default hereunder at the time of giving notice and further provides:

- Written notice to vacate at least forty-five (45) days prior to move-out, and,
- Pay owner all rents and other charges through date of termination, plus a termination fee equal to one months rent, prior to vacating and/or turning in keys to the apartment
- Resident pays owner all earned concessions during present lease term.

The foregoing shall not release resident of any responsibilities and obligations regarding damage to the apartment nor be construed as a waiver or release of resident from payment of rent and other charges, when due, through the date of termination. **No notice shall be effective unless and until the consent and signatures of all residents on the lease are obtained and submitted to owner**

Rent Payment Addendum: Rent is due on or before the 1st of every month without demand or deduction. Failure to pay by the 5th will result in a late payment of 10% of your market rent. After the 5th you must also pay by certified check, cashier's check or money order and it must include the late fees. NO PERSONAL CHECKS WILL BE ACCEPTED. If rent and late fee have not been paid by the 11th of the month, your account will be turned over to our attorney for judgment and possession of your apartment. In order to cancel legal proceedings, you must contact our attorney and make payment arrangements for all of the following, but not limited to, rent, late fees, and legal fees in certified funds. If rental payments are made late more than twice, the lease will be subject to termination.

If a rent check is returned for non-sufficient funds, a $30.00 NSF Fee will be charged as well as a late fee of 10% of market rent. The check must be redeemed in certified funds, as company policy does not permit us to re-deposit a check for any reason. Legal action will be taken on any returned check not paid within 48 hours. If a second check is returned on your account for non-sufficient funds, all future rent payments will need to be made in certified funds.

It is the policy of the Management not to accept partial payment by roommates however; roommates may pay with separate checks, provided the checks are received as one payment (i.e. at the same time). As a reminder, cash will not be accepted in the Management Office.

Married Couples/Roommate Addendum: In roommate and/or married couple situations, each person is always jointly and severally liable for all sums due, i.e. rent, late charges, damages etc., while all parties' names are on the lease. The deposit is placed on the apartment and is not refunded until the apartment is vacated. When the apartment is vacated, the balance of the security deposit will be refunded in one check, jointly payable to all residents named on the current lease. All parties must endorse the check in order for it to be cashed. FORGERY IS A FELONY. Do not endorse the security deposit refund check in behalf of a roommate/spouse. If a roommate and/or one spouse

moves out and is being replaced, but the other person(s) remains, the following applies:

- The departing resident must contact the Management Office to sign an Intent to Vacate form. If this form is not signed, the outgoing resident will remain jointly and severally responsible for the apartment.
- The replacement person(s) must qualify for residency before he or she moves in.
- The departing resident must complete the Assignment of Security Deposit (located on the Intent to Vacate form), transferring "...all right, title, and interest, if any, to (the) security deposit to the replacement person."
- The remaining and replacement person(s) must sign a new lease. This releases the departing person from responsibility for any future charges or future damages to the apartment.

If a roommate and/or one spouse moves out and the other person(s) chooses to assume responsibility for the apartment, the following applies:

- Same as above
- The remaining person must sign a new lease, thereby releasing the outgoing person from responsibility for any future charges or future damages to the apartment.
- If departing person is due any money, it must be collected from the remaining person(s). When the apartment is vacated, any refund or deposit due will be issued by check in the name of the remaining resident, as theirs should be the only name on the current lease.

If the appropriate documents are not signed, the original person(s) and/or married couple will continue to be jointly and severally responsible. When the apartment is vacated, the balance of the security deposit will be refunded in one check jointly payable to all residents originally listed on the current lease. In some cases, the lease is completed and one person wants to give a 45-day notice, however the remaining person(s) does not want to take full responsibility for the apartment. It is imperative the person(s) comes to an agreement; otherwise, all residents will remain jointly and severally responsible for the apartment.

Utility Responsibility Addendum: I do hereby understand that if I do not make arrangements to transfer Virginia Power accounts to my own name prior to moving in, my utility services will be disconnected 48 hours from my move-in date. In addition, a $15.00 utility transfer fee will be deducted from my security deposit upon move out.

Resident will be responsible for paying water and sewer provided in the apartment during the term of the lease. The apartment is individually metered for water use and Management has contracted with a third party to read water usage each month for each apartment and to bill residents for the amount of water and sewer usage attributable to the resident's apartment. Resident acknowledges and agrees that $2.00 per month is to be included in the cost of providing water and sewer service to the apartment each month for the expense of determining individual usage and for directly billing each resident. Resident agrees to pay a one-time account activation charge of $10.00. Failure to submit timely payment each month will result in a $5.00 late charge. The cost of providing water and sewer to the apartment is considered additional rent which becomes due in the month immediately following the date of billing to the resident. In the event such bill is not paid within 30 days of the due date, such failure to pay, at Management's election, shall constitute a default under the lease. Any amounts past due and/or your last water/sewer charges may be deducted from your security deposit.

Verified with Virginia Power @ (888) 667-3000 _____

Key Addendum: I understand that these keys are the property Westfield Village and must be returned when I vacate the apartment. There will be a $10.00 per key charge for each lost or not returned key at move out.
I have received __ apartment keys and __ mailbox keys. If additional keys are needed during your residency, a $1.00 charge will be added to your account. If you request for your locks to be changed, a fee of $25.00 will be charged at the time of the request.

Satellite Dish Addendum: Lincoln Property Company wants all residents to fully enjoy the utmost in beauty and lifestyle in their apartment home. Therefore, it will be necessary for all residents to observe the following minimal guidelines when installing a satellite dish.

- Only one satellite dish is permitted per apartment home.
- Satellite dishes must be one meter or less in size.
- Satellite dishes are restricted to the area within your private balcony or patio, and should not extend beyond the patio or balcony railing. No satellite dishes will be permitted in common areas or breezeways.
- Satellite dishes may not be placed or hung on roofs, outside walls, windowsills or railings. Drilling or puncturing of outside walls, railings, roofs or windowsills will not be permitted.
- A qualified person or company with worker's compensation insurance and adequate public liability insurance must do installation of the dish. We reserve the right to inspect and approve installation procedures.
- Installation must comply with reasonable safety standards and may not interfere with the community's cable, telephone or electrical systems or those of neighboring properties.
- The satellite dish and all related equipment must be removed upon move-out. The resident will be responsible for any damages and for the cost of repairs or repainting that may be reasonably necessary to restore the premises to its condition prior to installation.
- Resident is fully responsible for the satellite dish and all related equipment. Resident also agrees to defend, indemnify and hold harmless Lincoln Property Company and/or Owner from any claims by others relating to the satellite dish, its installation and/or related equipment.
- Proof of renter's insurance with a minimum liability coverage amount of $10,000 is required before installation. Please bring a copy of your liability insurance to the office.

Community Policies: I have read and agree to all terms and conditions to the Westfield Village Community Policies.

Package Release: Westfield Village will accept packages from commercial delivery services (UPS, Federal Express, etc.). I hereby release Westfield Village apartments (owners, agents, representative, or contractors) from all liability during acceptance and storage of packages received. Residents agree to pick up packages within 48 hours of notification in order to avoid return.

Pet Addendum: A per pet deposit will be paid in the amount of $300.00 (in addition to the apartment security deposit) of which $150.00 is non-refundable. Additionally, a $15.00 per month pet rent will be charged per pet.

- Resident agrees that only pet(s), not to exceed 2 described and named below, will occupy the premises. No additional or different pet is authorized under this agreement.
- Resident agrees that the pet(s), will be kept inside the apartment at all times except when on a leash accompanied by and under control of the resident.

Also, resident agrees to pick up after the pet on the apartment grounds. Resident understands, failure to do so will result in a $50.00 fine.

- Resident agrees that if the pet(s) becomes annoying, bothersome or in any way a nuisance to other residents or to the apartment operation, the resident will immediately upon notice from management, remove the pet(s) from the premises or vacate the apartment unless an agreement can be reached between both parties.
- Resident agrees that pet will not be tied or staked outside the apartment and may not be left unattended on patios or balconies. In addition, pet food is not permitted in the breezeways or patio/balcony areas.
- Resident agrees that the pet will not exceed 25 pounds in weight when fully grown.

Type:	Type:
Breed:	Breed:
Name:	Name:
Age:	Age:
Color:	Color:

Read and accepted (pg1-4):

Signature of all Residents

Signature of Owner's Representative

5111 Woodmere Dr # 104
Centreville, VA 20120

I understand that this key is the property of Westfield Village and must be returned when I vacate the apartment. There will be a $10.00 per key charge for lost or not returned keys at move out.

I acknowledge receipt of 1 (one) mailbox key for my apartment.

If a request is made for the locks to be changed, a fee of $25.00 will be charged at the time of the request.

Name

2/01/03
Date

Signature

Water & Wastewater
Account Activation Request

Property Westfield Village

Resident Name Roche (Last) christophe (First) (MI)

Street Address 5111 Woodmere Drive Unit # 104

City Centreville, State VA, Zip Code 20120

Mailing Add. (if different) _____

Home Phone 703 855-9500 Bus. Phone 703 222-6714

Employer Marketing Ventures Assc.

Roommate or Spouse Name Juanita ~~Castillo~~ Castillo

Employer Same Bus. Phone Same

Total # of Occupants 3

Lease Term 12 (mo.) Move-in Date 3/31/01 Move-out Date 3/30/02

Meter Reading and/or Billing / Collection Service	***Fee***
Monthly Service Charge	$2.00/mo.

Miscellaneous Charges	***Charge***
Account Activation	$10.00
Past Due	$5.00
Returned Check	$25.00

Resident understands and agrees that water and wastewater charges are considered additional rent. Resident understands that failure to pay water and wastewater charges is an event of default under the lease agreement which could result in legal action to have the resident evicted from the premises. Any outstanding balance may be deducted from your security deposit at lease termination.

Resident Signature Juanita Castillo Date 3/30/01

Leasing Agent Signature Marlene Luis Date 3/30/01

Residents, your account will automatically be established by property management. For future billing questions or comments, you may call us at (800) 546-6701.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[Nov. 27, 2002]

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendants Lincoln Property Co.'s ("Lincoln"), INVESCO Institutional's ("INVESCO"), and SWIB Investment Co.'s ("SWIB") (collectively, "Defendants") motion to dismiss the Plaintiffs' complaint pursuant to Rules 8(a)(2), 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. This case concerns Plaintiffs Christophe and Juanita Roche's claim that Defendants failed to properly maintain their apartment, that such failure allowed toxic levels of mold to develop in various areas of the apartment, and that these toxic mold levels caused Plaintiffs and their family, including their pets, various personal and monetary injuries. The issues before the Court: (1) whether the Plaintiffs' complaint improperly groups the Defendants denying them of fair notice as to which claims are specific to each Defendant; (2) whether the Plaintiffs plead fraud with the specificity required under Rule 9(b); and (3) whether the Plaintiffs' twelve counts state a claim for which relief may be granted. The Court holds that the Complaint fails to

allege how each Defendant injured Plaintiffs, as required by Rule 8(a). Moreover, the Complaint fails to plead fraud or constructive fraud with the specificity required by Rule 9(b), and, except as to Count I, the Complaint fails to state a claim for which relief may be granted under Virginia law.

I. BACKGROUND

Plaintiffs entered into a lease (the "Lease") with SWIB, as owner, and Lincoln, as property manager, to rent an apartment at Westfield Village, an apartment complex in Centreville, Virginia. In its advertisements for the Westfield apartments, Lincoln stated that it "provided exemplary service in a quality home environment." (Compl. ¶ 19.) Plaintiffs allege that this representation was "the primary and material reason why [they] entered into the Lease." (*Id.*)

Plaintiffs notified Lincoln on several occasions of water leaks that needed repair, of holes that had been cut in the wall that needed repair, of the carpet being torn up, and of "the fact that mold was all over [the] apartment." (Compl. ¶ 17.) Plaintiffs notified Lincoln of these problems orally and in writing; Lincoln disregarded these warnings and requests. (Compl. ¶ 18.)

Plaintiffs allege that toxic levels of mold developed within the apartment due to the moisture damage from the leaky fixtures; in March 2002, a consultant conducted testing in the apartment and discovered that there was "extensive" mold contamination in the apartment. (Compl. ¶ 28.) These toxic levels of mold "adversely affected the personal property and health of the Roche family." (Compl. ¶ 16.) Plaintiffs allege several health-related injuries and personal property damage valued at $165,000. (Compl. ¶¶ 20-21, 26, 29, 34, 47, 48, 49.)

Plaintiffs allege that Lincoln had notice of the mold problem at this property and other properties managed by Lincoln in the Northern Virginia area. (Compl. ¶¶ 33-39.) Furthermore, Lincoln temporarily relocated the Plaintiffs

to another location, allegedly contaminated as well. (Compl. ¶¶ 33-34.) Plaintiffs contend that Lincoln engaged in a course of deception by not notifying its residents, at several properties, of the toxic mold problem. (Compl. ¶¶ 37-39.) Finally, Plaintiffs allege that Mr. Roche was the subject of a retaliatory adverse employment action when he notified Lincoln, his employer, of the mold problem in his and other units within Westfield. (Compl. ¶¶ 41-45.)

II. DISCUSSION

A. Standard of Review

1. Fed. R. Civ. P. 8(a)(2) – A Pleading Shall Set Forth a Short and Plain Statement of the Claim Showing That the Pleader is Entitled to Relief

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that "[a] pleading which sets forth a claim for relief, . . . , shall contain (2) a short and plain statement of the claim showing that the pleader is entitled to relief." In order to comply with Rule 8(a)(2), a complaint must provide the defendants "fair notice of the claim and grounds upon which it rests." *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227 (4th Cir. 1998). Where the complaint names several defendants, the complaint must allege, with precision, the wrongful conduct charged to a particular defendant and cannot plead all of its claims against all defendants collectively. *See Nagel v. ADM Investor Servs. Inc.*, 995 F. Supp. 837, 845 (N.D. Ill. 1998). The complaint must discuss each defendant's acts and the resulting injury to the plaintiff.

2. Fed. R. Civ. P. 9(b) – Pleading Fraud with Specificity

Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). This heightened pleading requirement for fraud serves the purposes of providing defendants with fair notice of the plaintiff's claim, protecting defendants from harm to their reputation or goodwill, and reducing the number of nuisance or "strike" suits. *Weill v. Dominion*

Resources, Inc., 875 F. Supp. 331, 338 (E.D. Va. 1994). In multiple-defendant cases, the complaint must allege the specific fraudulent actions credited to each defendant. *See Goldstein v. Malcolm G. Fries & Assoc., Inc.*, 72 F. Supp. 2d 620, 627 (E.D. Va. 1999). *See also, Brooks v. Blue Cross & Blue Shield, Inc.*, 116 F.3d 1364, 1381 (11th Cir. 1997) (dismissing fraud claim where plaintiffs had lumped together all of their allegations of fraud against the defendants); *Vicom Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 778 (7th Cir. 1994) (stating that a complaint that lumped all the defendants together and did not specify who was involved in what fraudulent activity was insufficient under Rule 9(b)).

3. Fed. R. Civ. P. 12(b)(6) – Failure to State a Claim Upon Which Relief May Be Granted

A Rule 12(b)(6) motion should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Fed. R. Civ. P. 12(b)(6); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiffs, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Conclusory allegations regarding the legal effect of the facts alleged need not be accepted. *See Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendants to prepare a fair response. *Conley*, 355 U.S. at 47. This initial standard sets out how the Court construes the Complaint. The follow-on sections provide the substance in analyzing a 12(b)(6) motion.

B. Analysis

Considering the various standards of review involved in this motion to dismiss and construing the allegations in

the Complaint in the light most favorable to the Plaintiff, the Court dismisses the Complaint as to all counts. The reasons for dismissal as to each count are set forth below. Furthermore, the Court dismisses Defendant INVESCO from this suit as Plaintiffs have failed to allege how INVESCO was a party to the lease or to the management of the Westfield apartments.

1. Count I – Negligence

Although the Court finds that Plaintiffs have substantiated a claim for negligence on behalf of the maintenance management company at Westfield apartments, this count fails because the Complaint does not set out, with specificity, the acts of each particular defendant. The Complaint alleges that "the defendants had a duty to maintain the Roche apartment with due care in accordance with their duties as a landlord, . . . ," (Compl. ¶ 52) and that "the defendants breached" this duty (Compl. ¶ 53). The Complaint lumps the Defendants together and does not allege the wrongful conduct of each individual Defendant; hence, the Complaint does not provide Defendants sufficient information to frame a responsive pleading. The Complaint is infirm with references to "the defendants" without specifying which Defendant engaged in the allegedly wrongful conduct; however, the Court does not dismiss the Complaint as a whole on this basis because the other counts are substantively infirm.

2. Count II – Breach of Lease

The Court dismisses Count II, except to the extent that the claim is derived from provisions in the Lease. Plaintiffs allege that "[p]ursuant to the Lease between the defendant and Roche, the defendants provided an express warranty with respect to their duties to properly maintain the referenced premises." (Compl. ¶ 59.) Plaintiffs fail to specify the particular "express warranty," within the Lease, that Defendants violated; these allegations fail to withstand a motion to dismiss because they do not provide Defendants notice of the grounds of the claim.

The other allegations within Count II refer to Defendants' breach of their warranty obligations contained in "advertisements and inducements." (Compl. ¶ 61.) These allegations, however, do not support a claim for breach of the Lease because, as contended by Defendants, the integration clause in the Lease (Defs.' Ex. A at ¶ 30) precludes Plaintiffs from asserting a claim based on representations outside of the Lease. *See Scheduled Airlines Traffic Offices, Inc. v. Objective, Inc.*, 180 F.3d 583, 593-94 (4th Cir. 1999) (stating that, under Virginia law, plaintiff could not base breach of contract claim on discussions prior to the execution of the contract because the written contract contained an integration clause) (citing *Spotsylvania County School Board v. Seaboard Surety Co.*, 415 S.E.2d 120 (Va. 1992)). The Court dismisses Count II except to the extent that the claim is derived from a breach of a particular provision in the Lease.

3. Count III – Breach of Implied Warranties

Plaintiffs' main contention in this count is that the Defendants breached the common law implied warranty of habitability. In Virginia, however, there is no common law implied warranty of habitability between landlord and tenant. *Powell v. John E. Hughes Orphanage*, 138 S.E. 637, 644 (Va. 1927). The Virginia Supreme Court stated that "the tenant hires at his peril, and a rule similar to that of *caveat emptor* applies and throws upon the lessee the responsibility of examining as to the existence of defects in the premises and providing against their ill effects." *Id.* Thus, Plaintiffs' Count III is dismissed because, as a matter of law, Plaintiffs, as tenants, cannot recover under this theory.

4. Count IV – Breach of Contract

Plaintiffs allege that the Defendants entered into a contract when they "agreed to perform some of the requested repairs in consideration of Roche's forbearance in filing any type of legal claim or action against them regarding the mold condition." (Compl. ¶ 76.) Plaintiffs allege that Defendants breached this contract when they "refused to

give the assurance that the apartment would be free from the toxic mold condition." (Compl. ¶ 77.) This implied contract, however, arose under the Lease agreement, an express contract.

Plaintiffs are precluded from asserting an implied contract claim against Defendants under Virginia law because a valid contract already existed governing the rights and duties with respect to the lease of the apartment. *Ellis & Meyers Lumber Co. v. Hubbard*, 96 S.E. 754, 760 (Va. 1918) ("It is only in the absence of an express or of an enforceable contract between the parties that they [*sic*] law will, from circumstances, imply a contract between them."). Plaintiff entered into the Lease with Defendants Lincoln and SWIB; the Lease governed the rights and duties with respect to the lease of the apartment at Westfield Village. Furthermore, the Lease contained a valid integration clause, thereby precluding any implied contracts. Count IV is dismissed as a matter of law for failure to state a claim upon which relief may be granted.

5. Count V – Fraud / Intentional Misrepresentation

Plaintiff alleges in the Complaint that "[t]hrough its sales brochure, and advertisements, defendants misrepresented that plaintiff's home was of high quality and would be maintained." (Compl. ¶ 83.) Plaintiffs assert that they relied on these alleged misrepresentations when they entered into the Lease. (Compl. ¶ 85.)

Under Virginia law, a plaintiff must plead and prove that: (1) the defendant made a false misrepresentation of material fact, (2) the representation was made intentionally and knowingly and with the intent to mislead, and (3) the plaintiff reasonably relied on this representation to his detriment." *Graham v. RRR*, 202 F. Supp. 2d 483, 491 (E.D. Va. 2002). Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). At a minimum, the plaintiff must plead "the time, place, content, and identity of authorship of any alleged misrepresentation." *Goldstein*

v. Malcolm G. Fries & Assoc., Inc., 72 F. Supp. 2d 620, 627 (E.D. Va. 1999); *see also Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994); *Katz v. Household Int'l, Inc.*, 36 F.3d 670, 675 (7th Cir. 1994).

In this case, the Complaint lacks the specificity required by Rule 9(b)'s heightened pleading requirements. Plaintiffs do not set forth specific allegations as to each individual Defendant. (Compl. ¶¶ 82-88.) Plaintiffs fail to specify or to provide the advertisements or brochures that induced them to enter into the Lease; Plaintiffs fail to specify how they reasonably relied on a particular false statement.

Furthermore, a fraud claim must be based on a representation of material fact: "a present or preexisting fact, it cannot be predicated on unfulfilled promises or statements as to future events." *Parker-Smith v. STO Corp.*, 551 S.E.2d 615, 619 (Va. 2001). A mere expression of opinion will also not suffice. *McMillion v. Dryvit Sys., Inc.*, 552 S.E.2d 364, 370 (Va. 2001). Plaintiffs base their fraud claim on their allegations that Lincoln represented that "the apartment was of high quality" and that "there was prompt attention for emergency maintenance." (Compl. ¶ 84.) The representation that the apartment was "of high quality" is a statement of opinion, and, absent more information, the statement is not actionable as fraud. Plaintiffs have not alleged that Defendants failed to provide prompt attention to an emergency situation. The fact that Plaintiffs lived in the allegedly mold-ridden apartment for one year does not constitute an emergency. Plaintiffs' allegations fail to meet the heightened pleading standards of Rule 9(b) and fail to state an actionable claim for fraud; Count V is dismissed.

6. Count VI – Constructive Fraud / Negligent Misrepresentation

Under Virginia law, in order to state a claim for constructive fraud, the plaintiff must allege that (1) there was a material false representation, (2) the hearer believed it to be true, (3) it was meant to be acted on, (4) it

was acted on, and (5) damage was sustained. *Nationwide Inc. v. Patterson*, 331 S.E.2d 490, 492 (Va. 1985). Pleadings for constructive fraud must also meet the heightened requirements of Rule 9(b). Like Plaintiffs' actual fraud claim, their claim for constructive fraud fails to meet the requirements of Rule 9(b). *See supra*, Part II.B.5. Count VI is dismissed.

7. Count VII – Consumer Fraud

Plaintiffs allege that Defendants violated the Virginia Consumer Protection Act ("VCPA") by, among others, "[a]dvertising goods or services with the intent not to honor their claims" (Compl. ¶ 96.f), "[o]ffering for lease defective goods" (Compl. ¶ 96.g), omitting that they knew about the "inherently defective piping systems" (Compl. ¶ 96.b). However, the VCPA does not apply to "[a]ny aspect of a consumer transaction which is subject to . . . the Virginia Residential Landlord and Tenant Act . . . unless the act or practice of a landlord is a misrepresentation or fraudulent act or practice under § 59.1-200 [of the Virginia Code]." Va. Code Ann. § 59.1-199.E (2002). Because Plaintiffs fail to state a claim for fraud and the VCPA does not cover landlord-tenant leases, Count VII is dismissed.

8. Count VIII – False Advertising

Count VIII is dismissed for the reasons set forth in Count VII in that the Virginia Consumer Protection Act does not apply to a residential landlord-tenant dispute.

9. Count IX – Tortious Interference with Contract by Improper Methods

In Count IX, Plaintiff Christophe Roche alleges tortious interference, by Defendants, with his at-will employment contract. Mr. Roche alleges that Lincoln interfered with his at-will employment agreement by "employ[ing] verbal and written attempts to discredit, defame and ostracize the plaintiff with the motive to terminate him" (Compl. ¶ 107), and by "defrauding him and giving him false assurances that they would abide by their grievance procedure, which they have refused to honor" (Compl. ¶ 108).

Mr. Roche's claim fails as a matter of law because Lincoln cannot tortiously interfere with its own contract. *Chaves v. Johnson*, 335 S.E.2d 97, 120 (Va. 1985). Plaintiffs' tortious interference with a contract claim does not survive this motion to dismiss because Lincoln cannot tortiously interfere with its own contract: Count IX is dismissed.

10. Count X – Conversion

Plaintiffs allege that the "defendant converted the personal property of Roche" (Compl. ¶ 113) without alleging the identity of the "defendant." This type of pleading fails to specify which of the Defendants converted the Roches' property. Count X is dismissed because it fails to notify the Defendants which of them engaged in the conversion of Plaintiffs' property. The Court does not make a finding as to the viability of the substantive merits of the claim.

11. Count XI – Intentional Infliction of Emotional Distress

Plaintiffs' main allegation is that the Defendants' conduct "was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." (Compl. ¶ 118.) To establish a claim for intentional infliction of emotional distress ("IIED"), Plaintiffs must show that (1) the defendants' conduct was both intentional or reckless and outrageous and intolerable, (2) a causal connection between the conduct and Plaintiffs' emotional distress, and (3) the emotional distress was severe. *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991). The Virginia Supreme Court has set a high bar to establish a claim for IIED: "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* Plaintiffs, in this case, rely on allegations that the Defendant landlords' maintaining a mold-ridden apartment certainly poses a health risk to occupants; however this conduct is negligent, not outrageous as a matter of law. These acts are disturbing, but insufficient to meet the high bar that Virginia has

established for IIED claims. Count XI is dismissed for failure to state a claim for which relief may be granted.

12. Count XII – Negligent Infliction of Emotional Distress

Plaintiffs incorporate all of their previous allegations and add that they have suffered "physical manifestations of injury." (Compl. ¶ 121-22.) Under Virginia law, a claim for negligent infliction of emotional distress ("NIED") must be the "natural result of fright or shock proximately caused by the defendant's negligence." *Delk v. Columbia/HCA Healthcare Corp.*, 523 S.E.2d 826, 834 (Va. 2000). The Virginia Supreme Court requires a "clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury." *Id.* Plaintiffs' conclusory allegation that they suffered physical manifestations of injury as a result of Defendants' conduct is not sufficient to support a cause of action for NIED. *See id.* Plaintiffs fail to plead with specificity that they incurred a physical injury which was "the natural result of fright or shock proximately caused by the defendants' alleged negligence." *Id.* Therefore, the Court dismisses Count XII of the Complaint.

13. Punitive Damages

Under Virginia law, punitive damages are awarded "only in cases of the most egregious conduct." *Phillip Morris Inc. v. Emerson*, 368 S.E.2d 268, 283 (Va. 1998). To support an award of punitive damages, a plaintiff must allege conduct evincing a conscious disregard of others' rights. *Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675, 683-83 (Va. 1982). Claims of negligence are, generally, insufficient to support a prayer for punitive damages. *Wallen v. Allen*, 343 S.E.2d 73, 78 (Va. 1986). A plaintiff must set forth facts establishing that the defendant "act[ed] consciously in disregard of another person's rights or act[ed] with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably

would cause injury to another." *Phillip Morris*, 368 S.E.2d at 283.

In this case, Plaintiffs make conclusory allegations about the legal effect of facts. The Complaint fails to provide any facts establishing that the Defendants acted with the requisite state of mind for an award of punitive damages. (*See* Compl. ¶¶ 86, 107, 108, 109, 116.) The Complaint's punitive damage prayer is dismissed.

14. INVESCO is Dismissed as a Defendant

Plaintiffs allege that INVESCO was the owner of the apartment where Plaintiffs lived because SWIB was wholly owned by and/or an affiliate of and/or a subsidiary of INVESCO. No pleadings lead to the conclusion that INVESCO, an independent corporate entity than [*sic*] SWIB, owned the apartment in question. INVESCO is not mentioned in the Lease. Plaintiffs seek to engage in a fishing expedition to determine if INVESCO is a correct defendant; they seek discovery on this issue. The Court does not grant this request because it is a waste of time and judicial resources. The court dismisses INVESCO as a defendant in this suit until Plaintiffs can show that INVESCO purchased the apartment in question from SWIB or that INVESCO assumed management responsibilities under the Lease.

III. CONCLUSION

The Court dismisses Counts I and X because Plaintiffs fail to plead with specificity the "bad acts" attributed to each Defendant. The Court dismisses Count II except to the extent that a claim therein is derived from a breach of a provision within the Lease. The Court dismisses Counts III, IV, VII, VIII, and IX because they fail as a matter of law and relief cannot be granted under any circumstances. The Court dismisses Counts V and VI because Plaintiffs fail to plead fraud with the specificity required by Rule 9(b). The Court dismisses Counts XI and XII because Plaintiffs have not met the high standard established in Virginia for pleading intentional infliction of emotional distress or negligent infliction of emotional

distress. The Court dismisses Plaintiffs' punitive damage prayer for failure to proffer any facts in support of that claim. The Court dismisses INVESCO as a defendant because Plaintiffs fail to establish how INVESCO is connected to the landlord-tenant transaction in question.

For the reasons previously stated, it is hereby

ORDERED that Defendants Lincoln Property, et al.'s Motion to Dismiss the complaint is GRANTED. It is further ORDERED that INVESCO Institutional is DISMISSED from this action.

The Plaintiffs are GRANTED leave to file an amended complaint within twenty days of this Memorandum Order. The Court declines to accept the proffered Amended Complaint filed on October 25, 2002, because Plaintiff did not have the benefit of this ruling to consider prior to drafting the Amended Complaint. Defendants are GRANTED twenty days, from the time of filing of the amended complaint, to respond.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 27th day of November, 2002.

/s/ GERALD BRUCE LEE
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
11/27/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB,
Defendants.

[filed Dec. 16, 2002]

SECOND AMENDED COMPLAINT

COMES NOW, the Plaintiff, Christophe Roche and Juanita Roche, by counsel, and for his amended Complaint states as follows:

1. Plaintiff, Christophe Roche, is a citizen of Fairfax County, Virginia, residing at 13620 Bent Tree Circle, Unit 302, Centreville, Virginia 20120.

2. This Court has jurisdiction of this matter as all of the causes of actions and injuries occurred in Fairfax County, Virginia.

3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. [Henceforth, Lincoln Property Company will be referred to as ("Lincoln").]

4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.

5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

6. SWIB Investment Company, was the owner of 5111 Woodmere Drive, Centreville, Virginia. [Defendant, SWIB Investment Company will hereafter be referred to as ("SWIB").]

7. Lincoln advertised in newspapers and in realtor brochures that it was the owner and property manager and maintainer of the premises known as Westfield Village Apartments and other apartment complexes in the Northern Virginia region. The public and respective apartment lessees were led to believe that these apartment projects and complexes were owned and operated entirely by Lincoln Property Co. In fact, the respective lessees would not know anything about who "SWIB" was until they executed the lease documents, at which time, and for the first time, they would see the name of "SWIB" as the owner of the premises.

8. After executing leases, the lessees, including the plaintiff, never knew anything about who "SWIB" was or how it operated, and all of its dealings were through the offices and staff of the Lincoln Property Co. All dealings and correspondence were with and through Lincoln.

7(b). The Defendant Lincoln acted as the agent for SWIB in maintaining the plaintiffs' apartment.

8. As an overabundance of precaution for pleading purposes, and to address the objections of the defendants pursuant to Rule 8(a)(2), the plaintiff further sets out in each specific Count below the wrongful conduct of each individual defendant and how that conduct injured the plaintiffs.

9. Upon information and belief, defendant/owner as described above, SWIB, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 51111 [*sic*] Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale, will determine if additional defendant or defendants will be named.

10. Plaintiff, Christophe Roche and Juanita Roche, signed a Lease with the owner who they believed to be Lincoln Property, for 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (hereinafter this location will be referred to as "the Roche apartment").

11. The above-described Lease sets forth the terms and obligations of the parties to the Roche apartment.

12. The defendant Lincoln is engaged in the real estate investment and/or property management business and trade under the various names.

13. The defendants Lincoln and SWIB at the time of the occurrence in question, and upon information and belief, currently manage and own, respectively, Westfield Village Apartments located in Fairfax County, Virginia, as described above.

14. Roche and his family leased an apartment in the complex (Unit 104) from the defendant, Lincoln, in which the Lease stated that SWIB was the owner, acting as agent for Lincoln (the Lease signature page speaks for itself in this regard).

15. Plaintiffs were a residents/tenants at Westfield Village during all relevant times and gave numerous notifications of the problems that are described below.

16. SWIB breached the Lease by ignoring the notifications of moisture damage which resulted in the formation of toxic mold that adversely affected the personal property and health of the Roche family. The notifications were given to Lincoln, the property managers of the apartment complex, which company (Lincoln) owed the duty of due care to the plaintiffs to maintain the premises.

17. For months, the Roche family advised Lincoln of water leaks that needed repairing. Holes had been cut in the walls of his apartment by the landlord that needed to be repaired, along with carpet that had been torn up, and the fact that mold was all over his apartment was brought to Lincoln's attention.

18. Numerous requests were made for rectifying this problem, and most of the notices were personally given by Roche. In addition to written letters, all of the warnings of the mold problems were disregarded by defendant Lincoln as property manager, and defendant SWIB as owner.

19. Lincoln held itself out through its advertisements and inducement to prospective residents that they "provide exemplary service in a quality home environment," and which inducement was the primary and material reason why Roche entered into the Lease. Lincoln had advertised that they provided 24 hour technical maintenance service, and had in effect a same-day service request policy. The apartment brochure advertisement set out what the prospective tenants' expectations were under a heading "YOUR EXPECTATIONS," and stated, "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee, ..."

20. Due to the failures and breach of its duties, as described below, Roche and his family, including a six year-old son, have been personally injured, as further described below.

21. The plaintiff has suffered injuries in connection with the exposure to the toxic mold and has been treated by physicians for these injuries, all caused by the breach of duties owed by Lincoln.

22. SWIB as owner of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment, including but limited, as follows:

a. In failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits.

b. In failing to inspect the apartment to determine if it was subject to water damage, mold damage, excessive moisture, etc.

c. In failing to provide Roche's family with a safe place to live;

d. In failing to adequately inspect the apartment for defects in the heating and air conditioning units and in the substrate duct material as well as condensation drain lines and filtration systems employed by the HVAC.

e. In providing, operating and maintaining the apartment in question with unsafe conditions, namely; recalled polybutylene water piping throughout the entire building. Through research, the pipes were known to rupture and cause massive water damage. As a result, older appliances such as washers, dryers, refrigerators, and dish washers were rusted out and leaking, leading to failure. Roche's washing machine water pump malfunctioned and flooded the apartment.

f. In providing, operating and maintaining the apartment with the knowledge, actual or constructive, that the apartment contained unsafe molding exposure and toxins, including Stachybotrys chartarum, Aspergillus, Penicillium, and other fungus species, which all contained dangerous levels of micro toxins.

g. In failing to repair and replace the unsafe conditions in the apartment.

h. In failing to provide prompt or reasonable maintenance in situations where service requests were placed with the office as promised by advertising and the lease agreement to the Roche family. Emergency calls, such as leaks, were ignored despite their urgency, and in contrast to the lease that warranted twenty-four hour service would be available for emergencies.

23. Each of the above acts and omissions, singularly and in combination with others, constitute a common law and/or statutory negligence that proximately caused the toxic mold in question and the resulting damage, injuries, and destruction of property owned by the plaintiff and her family.

24. The conduct of the defendants constitutes gross negligence. This conduct also constitutes a heedless and reckless disregard and a conscious disregard of the rights of Roche and his family, and involves such an entire want of care as to indicate that it was the result of a conscious disregard of their rights, welfare and safety.

25. Further, Roche cannot more specifically allege the acts of negligence on the part of the defendants herein that proximately caused the condition to exist in question for the reason the facts in that regard are peculiarly within the knowledge of the defendants. In the alternative, in the event the plaintiff is unable to prove specific acts of negligence, plaintiff relies upon the doctrine of *res ipsa loquitur*. In this connection, Roche would show that the maintenance and operation of the apartment in question were within the exclusive control of the defendants. Plaintiff had no means of ascertaining the method or manner in which the apartment was maintained. The occurrence causing harm to the plaintiff, as described above, was one which, in an ordinary course of events, would not have occurred without negligence on the part of the defendants. Consequently, defendants were negligent in providing and maintaining the apartment in question,

which negligence was a proximate cause of the damages, injuries and losses sustained by the plaintiff, as set out more fully below.

26. As a result of exposure to toxic mold caused by the negligence of Lincoln, Mr. and Mrs. Roche have suffered chronic migraine headaches and sinus headaches, chronic fatigue, lack of energy, dizziness, vertigo, forgetfulness, confusion, lack of concentration, stomach aches, constipation and diarrhea, blurred vision, ear pain, restless sleep, body aches, difficulty breathing, cough, burning, cramps, chest pain, swollen glands in the neck and throat, loss of dexterity and/or coordination, chronic fatigue, burning eyes and eye pain.

27. The Roche family were exposed to toxic mold for approximately one year, from March 2001 until 2002, when they were required to evacuate their apartment.

28. The Roche family was unaware of this exposure to the toxic molds, including Stachybotrys Chartarum until a Mold Investigation Report by Potomac Environmental Testing Services of Germantown, Maryland, was conducted and a report was received in March of 2002 at the Roche family's request and expense. That report stated that there was a significant amount of past water leakage, and that this is the cause of the toxic mold growth and contamination that occurred in the apartment, and that the level of contamination was extensive.

29. The occupants of Unit 104, which was the apartment leased by Roche and her family, were continuously and repeatedly exposed to toxic fungal spores during their period of occupancy. As a result of the exposure to these toxins, the Roches developed physical symptoms of cough, sore throat, and neurological deficits which permanently have weakened their concentration and brain processing capabilities.

30. Roche is 32 years old, and his wife, Juanita Roche, is a 23 year old pre-school teacher, and were in general good health.

31. The Roche family, including their 6 year old son, has been subjected to anxiety not only due to their health concerns, but also because of stress from the loss of virtually all of their worldly possessions including many sentimental items, and disruption of their day-to-day life. This was caused by the exposure to the toxic mold proximately caused by the defendants' acts.

32. As a result of the above negligence of the defendants, the Roche family has been caused great inconvenience, including what amounts to a constructive eviction.

33. The Roche family was forced to move out of their apartment and was placed temporarily in another property managed by Lincoln. That property also was contaminated with toxic mold. The temporary property within "The Village at Potomac Falls," was the guest suite of the complex and was the Roche family's home for approximately a month and a half. A week after moving in, Mr. Roche was confronted by Vernon Tatem, an employee of Lincoln Property and was asked to allow Tatem to enter his unit for contracted work. In Roche's unit they entered a water closet in which access is restricted to residents by a lock. Upon unlocking and entering the water closet Mr. Roche noticed the room was infiltrated with the same mold as the old apartment, brought on by severe water damage from the hot water over flow pipes leaking inside the closet. Upon further investigation, it was discovered that a number of units throughout that property had the same problem as well as discovering fire sprinkler control rooms with the problem as well. Upon witnessing the mold in the room, the contractor who was sent to repair the walls and remove the mold, looked at it, and warned Mr. Roche to stay back from the mold and not to breathe it and stated "Don't get near it, its bad news, it can cause pneumonia and other bad stuff".

34. While the Roche family was temporarily moved to the Village at Potomac Falls, the family's pet dog and cat had to be placed in a kennel, and appeared to be affected by the toxins as they lost hair, weight, and energy. The

family was displaced from March 10, 2002, up and to the present, without their personal clothing, furnishings, and belongings.

35. The concealment from residents of exposure to dangerous levels of toxins is and has been a conscious and predetermined plan on the part of Lincoln.

36. For the year 2001, Lincoln managed other properties in Northern Virginia and in this region, in which they were aware of the dangerousness of toxic mold. Lincoln had a written policy that was in effect at all times relevant herein, that warned their employees of the need to immediately address discovery of mold in its commercial rental properties and to take prompt action. Notwithstanding this Lincoln written policy, they ignored it in the instant case concerning the Roche family and continued a course of concealment of this highly dangerous condition from residents at their other rental properties owned or managed by Lincoln or its wholly owned subsidiaries or investment assignees.

37. During the same relevant time period, or just immediately prior thereto, Lincoln was managing Summit Village Apartments (now known as Rosslyn Heights) located in Arlington, Virginia. Moisture problems in the apartments were brought to Lincoln's attention, and tests were conducted to determine if there had been formation of toxic molds. After getting the results of the test, Lincoln went on a course of intentional concealment of this information from the residents at Summit Village, telling the residents there that they were fixing air conditioning units in closets without disclosing to them that the tenants themselves had been exposed to toxic spores. Even as of this date, upon information and belief, those tenants are unaware of the dangerous condition created, and upon information and belief, may be suffering from health conditions and complications due to the exposure to the toxic molds. It is estimated that approximately 55 tenant families at Summit Village, now known as Rosslyn Heights, have been exposed and may suffer from the same

conditions as Roche and his family, and may have been seeking medical treatment, not aware that it was caused by the toxins due to mold formation. Lincoln went on a course to advise all of its staff to strictly keep confidential this information from the tenants, and even had a policy of only going into the apartments to remediate at Summit Village when tenants were not at home.

38. This course of deceptive conduct was the same that they subjected the Roche family to, and others at Westfield Village.

39. When the Roche family was temporarily removed to another Lincoln property, The Village at Potomac Falls, the same deception continued, as described above. Vernon Tatem approached Mr. Roche and was asked to please remain quiet about entering the unit, since he was not authorized to inform Mr. Roche about the entering. After a month's period of residency, it was disclosed that Lincoln's upper management was aware of the mold problems as Cheryl Bel-Dean called Mr. Tatem and Peter Moriba to a meeting to instruct them to conceal the mold problems on the property, including in Roche's unit. Ms. Bel-Dean informed the men that a very large lawsuit could be filed against Lincoln. Melvin Bryant and Jon LeBeau, a Lincoln executive officer, were also aware of the mold problem at the temporary residence. Misters Mariba and Tatum felt their jobs would be in jeopardy if they mentioned anything about the mold. Within three days of Mr. Roche filing a grievance for arbitration with Lincoln concerning his employment, Mr. Tatem was fired from his position. Later, Mr. Peter Mariba, was terminated. The carpet contractor who warned Mr. Roche about the mold, was removed from all contracts on the property for sharing information about the mold condition.

40. Upon information and belief, maintenance personnel and staff of Lincoln have also been exposed to the toxins, with Lincoln's knowledge, and they have suffered similar consequences as the Roche family, but Lincoln has

concealed this information from their own employees. Lincoln technicians have been unwittingly subjected to dangerous levels of toxins at Summit Village (now known as Rosslyn Heights), where the units there were classified into 5 different levels of hazardous exposure. But Lincoln's maintenance staff were not advised as to the known levels they were exposed. [Outside contracting work crews performing remediation wore fungicidal protective full body and glove coating and suits in the units. Lincoln employees were given no protective suits or told of the hazards; these same toxins are utilized as chemical and biological warfare agents because of their human destructive capability.]

41. Mr. Roche was employed by Lincoln in December of 2001.

42. As a result of Mr. Roche placing his landlord and now his employer on notice of the mold conditions in his own unit (he did not how that the toxins were in existence prior to his job with Lincoln), he was ostracized in his employment.

43. They transferred him from his normal work position and gave him an adverse employment transfer. Mr. Roche was moved to a new location for work in The Village at Potomac Falls, at which point he began to be stripped of his benefits such as sick leave, health benefits, and others. Once the mold issue became prevalent at The Village at Potomac Falls, Mr. Roche was moved to other smaller properties. Mr. Roche would be sent to perform work at a complex and upon arriving they would inform him that no work was needed. Mr. Roche would then be made to wander the properties picking up litter, which was not in his job's duties. Eventually Mr. Roche was sent to Ashburn Meadows where he continued to be given tasks such as trash removal, light bulb changing, and painting parking curbs. Employees were also instructed not to communicate with Mr. Roche.

44. Mr. Roche brought to the attention of Lincoln the treatment he was receiving and the adverse discrimination caused by the fact that he exercised his rights to live in a safe level toxin-free apartment. Lincoln terminated Mr. Roche under a pretext.

45. Lincoln proximately caused defamatory statements and adverse employment actions against Mr. Roche as described.

46. The above-described acts were intentionally caused by Lincoln, resulting in emotional distress and further complications to Mr. Roche's health.

46(a). Under the theory of *respondeat superior*, "SWIB", as the principal, is accountable for all of the wrongdoings and breaches by its agent, Lincoln.

47. As a result of the exposure to the toxins, the Roche family's personal property has been destroyed, lost or taken away. This has amounted to a conversion of Roche's property. This loss totals over $165,000.00 in personal property loss, including their automobile, and does not even include the sentimental loss of such things as wedding gifts, momentos, photos, precious and priceless items to the family, including but not limited to all photographs of children, first lost teeth, Ms. Roche's wedding dress, wedding photos, every home video, all original school work of children over their lives, medical records, birth certificates, social security cards, school and health records, financial documents, sentimental stuffed animals and hand made items, engagement rings, gifts, diplomas and degrees, awards and other important documents.

48. The Roche family has suffered medical expenses caused by the exposure to the toxins, and will continue to suffer medical expenses in the future to treat his injuries, including serious breathing difficulties, memory and hearing loss, dizziness, flu-like symptoms, and lung scarring caused by the airborne toxins, known as mycotoxins.

49. The personal injuries and brain damage caused by the defendants to plaintiffs are permanent and debilitating. The plaintiffs have been placed on daily medication, in the past and for the future, to treat lungs, skin disorders, memory loss, mental distress, and suffered

inconvenience, caused by living out of suitcases and uncertain locations.

50(a). All of the above allegations are relevant to all the below Counts and to issues of damages, both compensatory and exemplary, and are incorporated by reference in each one of the below listed Counts, as if fully set forth and re-alleged therein.

50(b). There is an statutorily imposed warranty in the Virginia Landlord-Tenant Act that requires this residential lease to have a warranty for fitness and habitability. ("Keep the premises in a fit and habitable condition"; comply with applicable building and housing codes materially affecting health and safety; maintain in good and safe working order facilities and appliances, all pursuant to Virginia Code Section 55-248.13, as amended.)

50(c). The Virginia Landlord-Tenant Act and other statutory law do not permit a lease to exclude the statutory warranties, which are made a part of every residential lease by law. (Virginia Code Section 55-248.9 prohibits limitation or waiver of the statutorily imposed warranties, and makes any lease provision attempting to do so "unenforceable.")

50(d). The conduct of defendant Lincoln was "outrageous or intolerable" conduct for the following reasons:

i. The acts done by defendant, Lincoln, were intentional. Lincoln sent from Texas an executive vice president to deal with the problems that the Roche family outlined. Instead of intending to address the problems, the executive vice president tried to intimidate the Roche family by trying to convince Mr. Roche that he had no claim and that it had to go through arbitration. The corporate executive further carried out a plan to pressure Mr. Roche to give up his employment and his position, all part of a scheme to discredit and ostracize and cover up the wrongs of defendant Lincoln.

ii. Defendant, Lincoln, in furtherance of the cover-up, instructed its own employee and staff not to disclose the hazards and toxic exposure that the Roche family was facing.

iii. At the relevant times while these complaints were being made by the Roche family, defendant, Lincoln, was exercising a secret plan to hide from other tenants at another Northern Virginia apartment complex the same hazardous condition and toxic exposures. Defendant, Lincoln, had instructed its staff to hide from residents the fact that they were fixing air conditioning units when in fact they were remediating toxic mold exposure caused by moisture damage. They even hid from some of their own employees and staff that they were working amongst, and cleaning up, toxic material without providing them the standard and industry accepted protective clothing and directives.

iv. When defendant, Lincoln, moved the Roche family to another location, that second location also had toxic mold, and the defendant, Lincoln, knew it. It intentionally went on a course to keep this secret from the Roche family and pressured and ostracized its own staff if they should reveal any of this information to the Roche family. For the second time they had placed the Roche family into a toxic mold condition and concealed the hazards from this family.

50(e). As described above, severe mental distress, including brain damage by affecting memory, and physically causing skin lesions, and severe physical ailments were suffered by the plaintiff as a result of the intentional acts by defendant, Lincoln.

50(f). All the above malfeasance and misfeasance acts of defendant Lincoln were done intentionally and with reckless disregard of the rights of the plaintiffs, justifying an award of punitive damages. The conduct of intention-

ally concealing from residents a known hazardous condition affecting health and well-being, and the insensitive manner of dealing with it, further justifies an exemplary damage award.

50(g). The acts attributed to defendant Lincoln were done in a willful and wanton disregard of the plaintiff's rights. The scheming and the subterfuge and intentional actions described above evinces a conscious disregard of the rights of others, and justify punitive damages where requested below. Specifically alleged above are actions of intentionally concealing from the public a policy of hiding toxic mold from residents in its own property-managed apartment complexes, and a scheme to hide from residents, its staff and others, the dangerousness of the conditions shown and created by the defendant, Lincoln, and defendant, "SWIB." Specifically, defendant, Lincoln, (i) harassed and ostracized and intended to destroy Mr. Roche's occupation and employment with defendant, Lincoln; (ii) had a plan amongst its executives to conceal hazardous conditions, as described above; (iii) acted intentionally and wantonly towards the plaintiff in addressing the problems described. Generally accepted principles of decency and human behavior would indicate that this is a conscious disregard of the rights of others, including the plaintiff.

COUNT I

(Negligence ~ *Per se* – Lincoln and SWIB)

51. Plaintiff incorporates herein by reference Paragraphs 1 through 50 above.

51(a). Specifically, Lincoln breached its duty to maintain the apartment. Defendant, Lincoln, held itself out to the public as the ostensible owner, operator and maintainer of the premises. Its brochures and advertisements claimed as such. It told the public that it would provide a first-class service and attention to defects brought to its attention.

51(b). Upon information and belief, Lincoln has a contract with the owner or an agreement that it would

provide the maintenance of the apartment complex in issue here.

51(c). Defendant Lincoln specifically had a duty to use due care to maintain the apartment so as to not injure the plaintiffs' property and persons. (Both a principal and agent can be held liable under Virginia common-law). The Defendant Lincoln engaged in the wrongful conduct set forth in paragraph 53 below.

52. Defendant, "SWIB" as owner of the property, is accountable for breaching its duties in having its agent, Lincoln Property, manage the property in a defective manner. As the owner, it had common-law duty of due care owed to the plaintiff, and it breached this duty and caused injury, as described above. It's [*sic*] duties are set forth in the Lease, Virginia statutory law, and common law. (In Virginia there is a duty to use ordinary care to keep premises in a reasonably safe condition, and this duty cannot be delegated: *Love v. Schmidt*, 239 Va. 357, 389 S.E.2d 707 (1990).

53. The defendant Lincoln, as the owner's agent for property management, breached SWIB's aforementioned duty and was negligent in its maintenance of the apartment. Specific acts of negligence include, but are not limited to, the fact that they:

a. Failed to keep the apartment free from toxic material and in a livable condition, as required under the Lease, and specifically, pertaining to the requirement that they prevent dilatory intrusion of water through the walls and coverings and to prevent leakage;

b. Failed to adequately respond to notification and failure to determine the character, quality and damage and hazardous conditions in existence upon notification;

c. Failed to adequately repair known leaks that resulted in formation of mold from water infiltration throughout the areas of the apartment;

d. Failed to select an appropriate remediation system that would adequately and properly keep the apartment waterproof and free from water intrusions;

e. Failed to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with, and in conformity with, industry standards and applicable Building Codes;

f. Failed to detect errors and failures in workmanship and quality of their repairs;

g. Accepted and approved defective and/or nonconforming materials and/or labor;

h. Provided deficient workmanship and/or defective materials without proper inspection to ensure that the work was correct and in conformity with customary industry standards in accordance with the landlord/tenant obligations at common law and under the Lease and failed to follow their own policies and instructions and specifications to correct such defects;

i. Failed to adequately waterproof and properly maintain the premises which would not allow moisture and infiltration into the interior of the structure;

j. Failed to replace defective pipes in a system that was known at the time to be defective and in need of replacement, the pipes being constructed of polybutylene, a material that the defendants knew should have been replaced in all of the structured apartments because of the industry standard concerning these pipes;

k. Failed to guard against the negligent acts of subcontractors;

l. Failed to correct defective conditions;

m. Failed to report the failure of installation to comply with manufacturer and other specifications; and

n. Committed other acts of negligence and breaches of the applicable Building Code and landlord/tenant obligations which may be revealed through discovery.

54. It was reasonably foreseeable that the aforementioned acts of negligence would damage the plaintiffs.

55. The Landlord/Tenant Act and Building Code and industry standards referenced above were enacted for public safety.

56. The plaintiff belongs to that class of persons whose benefit the referenced Code and industry standards were enacted.

57. As a direct and proximate result of the defendant Lincoln's wrongful acts and negligence, the plaintiffs have suffered damages to their property and their persons, including permanent damage to their brains, in the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest. Defendant SWIB is accountable for all these same wrongful acts of its agent Lincoln, and because it breached its common law duty to plaintiffs to use ordinary care to keep the apartment in a reasonably safe condition.

COUNT II

(Breach of Lease - SWIB)

58. Plaintiff incorporates herein by reference Paragraphs 1 through 57 above.

58(a). The defendant "SWIB" as owner is held accountable for the reasons expressed and incorporated above.

59. Pursuant to the Lease between the SWIB and Roche, the defendants provided a statutorily imposed warranty with respect to their duties to properly maintain the referenced premises.

59(a). Under paragraph 18 of the Lease, owner, "SWIB" agreed to act with reasonable diligence to maintain fixtures, heating and/or air conditioning equipment, and to remain in substantial compliance with applicable state [includes the Virginia Residential Landlord and Tenant Act] and local laws regarding safety and sanitation and to make all reasonable repairs. This express warranty in the Lease was breached for the reasons described above.

60. As set forth herein, the apartment contained numerous latent defects which the plaintiff had no knowledge at the time he entered into the Lease, including but not limited to, the piping that was defective, and the air conditioning units, and the installation of such was of such poor quality, and not free from faults and defects, including, but not limited to leaky piping and HVAC, and heating and air conditioning units, and rotting out drywall, and all was not in accordance with good construction practices. The latent problems and defects, unknown to Roche, occurred and manifested within the applicable warranty period.

61. By its promises to the plaintiffs to repair the defects the defendant SWIB committed itself to honor its warranty obligations in the Lease.

62. By reason of the defects and defective condition and activities as described herein, and the spreading of toxic mold causing toxins and spores of dangerous toxins to spread throughout the apartment, and through its own testing, the defendant, "SWIB," and its agent, defendant Lincoln, breached its express warranties to the plaintiff.

63. The plaintiff had notified the defendant, Lincoln, (Lincoln was the property manager and agent for the owner SWIB) of the defective condition of the apartment and the breaches of the express warranties, but the defendant, "SWIB" and its agent, Lincoln, failed to perform necessary remedial activities to correct these defects in a timely manner.

64. By reason of its failure to repair or replace the aforementioned defect in a timely manner, the defendant, "SWIB" breached its duty to repair under the Lease. Plaintiff has met all conditions precedent to recover under this warranty.

65. By reason of the defendant SWIB's breach of its lease duties, plaintiff has suffered property damages in the amount of at least $160,000.00 or according to proof at trial, plus interest.

COUNT III

(Breach of Implied Warranties - SWIB)

66. The plaintiff incorporates herein by reference Paragraphs 1 through 64 above.

66(a). Defendant SWIB warranted that as landlord it would provide a reasonably safe premises. This common law duty is an implied warranty under Virginia case law as set forth in *Love v. Schmidt*, 239 Va. 357, 389 S.E.2d 707 (1990).

[66(b). Not Included in Original]

66(c). Defendant Lincoln, as agent for SWIB, specifically breached its duty to perform its maintenance work in a workmanlike manner. The specific wrongful act of SWIB was in not addressing the defect upon notification; intentionally concealing their non-performance; and intentionally doing all the wrongful acts described above. They did this by and through their agent Lincoln, and Lincoln's staff on the premises, and the staff at the regional offices.

67. Also, by operation of law by way of the Virginia Landlord Tenant Act, the defendant impliedly warranted that the apartment would be habitable and free from toxic and dangerous materials.

[68. Not Included in Original]

69. Defendant SWIB breached this warranty in that the work was not of a workmanlike quality prevailing at the time and failed to satisfy the applicable standards of habitability and contained numerous latent defects.

70. Roche, who leased the apartment only approximately 12 years after it was built, did not and could not by reasonable inspection, have discovered the defects from said breaches of the warranties of habitability and workmanship at the time they leased the apartment, and when they did discover these at the very inception of their Lease, brought them to the attention of Lincoln, but no action was taken to correct the same.

71. By reason of defendant SWIB'S breach of its implied warranties, plaintiff has suffered property damages in the amount of $160,000.00 plus interest, or according to proof at trial, and will continue to suffer damages unless relief is granted.

COUNT IV

(Conversion - Lincoln)

72. Plaintiff incorporates Paragraphs 1 through 71 herein as if fully set out.

73. Defendant Lincoln converted the personal property of Roche in the manner described in paragraph 47 and by dispossessing Roche from his property without his consent and against his interests; and by destroying or losing property of Roche; and by wrongfully withholding property.

73(a). Lincoln took the plaintiffs' personal belongings from his apartment, advising that these items had been contaminated and had to be removed. These items have been lost or destroyed by the Lincoln after Lincoln took possession of them from the plaintiffs' apartment.

74. The conversion of Roche's personal property is approximately $250,000.00, of which $160,000.00 is for replacement cost for items destroyed by exposure to the toxic mold spores, and the other loss of priceless sentimental and other items that could never be replaced, such as gifts, mementos, wedding memorabilia, and as described above.

WHEREFORE, the Plaintiff, Christophe Roche, requests judgment in the amount of Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) for conversion of his personalty.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS

CHRISTOPHE ROCHE
By Counsel

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703) 385-2745

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[filed Jan. 6, 2003]

DEFENDANT LINCOLN PROPERTY CO.'S ANSWER TO SECOND AMENDED COMPLAINT

Defendant Lincoln Property Co. ("Lincoln"), by and through undersigned counsel, hereby states as follows for its Answer to Plaintiff's[1] Second Amended Complaint (hereinafter the "Complaint"):

1. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 1 of the Complaint, and therefore denies the same.

[1] To the extent that this Answer refers to "Plaintiff," that term shall mean Plaintiff Christophe Roche. Although Juanita Roche is named in the caption of the Second Amended Complaint (the "Complaint") as a plaintiff, she makes no factual allegations, nor does she assert any claims or make any prayers for relief against Lincoln. Moreover, the Complaint is signed only by the Attorney for Christophe Roche. To the extent that Juanita Roche seeks to make or assert any allegations, claims and/or prayers for relief, Lincoln reserves the right to amend its Answer accordingly.

2. Lincoln admits the allegations of Paragraph 2 of the Complaint.

3. Lincoln admits the allegations of the first sentence of Paragraph 3 of the Complaint. Lincoln admits that it develops and manages residential communities. Lincoln admits that it manages Westfield Village, which is located in Fairfax County, Virginia. Lincoln denies each and every other allegation of Paragraph 3 of the Complaint.

4. Lincoln admits that it manages residential properties in approximately 19 states. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning whether it is one of the "most diversified" real estate firms in the United States and whether it has a "presence" in "over 100 markets," and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 4 of the Complaint.

5. Lincoln admits that, by and through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia, it has managed Westfield Village Apartments since 1996. Lincoln denies each and every other allegation of Paragraph 5 of the Complaint.

6. Lincoln admits the allegations of Paragraph 6 of the Complaint.

7. Lincoln admits that it advertised in newspapers and in realtor brochures that it was the property manager of Westfield Village Apartments and that it was the owner and/or property manager of other apartment complexes in the Northern Virginia region. Lincoln denies each and every other allegation of Paragraph 7 of the Complaint.

8. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what lessees, including Plaintiff, knew or whether and the extent to which their dealings were exclusively through the offices and staff of Lincoln, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 8 of the Complaint.

7(b). Lincoln admits the allegations of Paragraph 7(b) of the Complaint.

8. Lincoln denies the allegations of the second Paragraph 8 of the Complaint.

9. Lincoln denies the allegations of Paragraph 9 of the Complaint.

10. Lincoln admits that Christophe Roche and Juanita Roche signed a lease with SWIB to lease an apartment at 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (the "Roche Apartment"). Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what Christophe and Juanita Roche believed, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 10 of the Complaint.

11. Lincoln admits the allegations of Paragraph 11 of the Complaint.

12. Lincoln admits that it is engaged in the real estate investment and/or property management business. Lincoln denies each and every other allegation of Paragraph 12 of the Complaint.

13. Lincoln admits that it currently manages Westfield Village Apartments on behalf of its owner, SWIB. Lincoln admits that throughout the plaintiff's tenancy of the Roche apartment, it managed Westfield Village Apartments on behalf of its owner, SWIB. Lincoln admits that Westfield Village Apartments is located in Fairfax County, Virginia. Lincoln denies each and every other allegation of Paragraph 13 of the Complaint.

14. Lincoln admits that Plaintiff and his family leased the Roche Apartment and admits that the lease stated that SWIB was the owner of Westfield Village Apartments. Lincoln denies each and every remaining allegation of Paragraph 14 of the Complaint.

15. Lincoln admits that Plaintiff and his family were residents/tenants at Westfield Village from August 1998 to May 1999 and from March 2001 to May 2002. Lincoln

admits that Plaintiff was a resident/tenant of Westfield Village. Lincoln denies each and every other allegation of Paragraph 15 of the Complaint.

16. Lincoln denies the allegations of Paragraph 16 of the Complaint.

17. Lincoln admits that, from time to time, Plaintiff advised Lincoln of conditions that needed repair in the Roche Apartment. Lincoln avers that, each time Plaintiff requested a repair, it promptly performed the repair. Lincoln admits that, at one point, a Lincoln service employee and/or a contractor cut holes in the Roche Apartment's drywall in connection with service to the apartment. Lincoln admits that, in January 2002, Plaintiff notified Lincoln for the first time that there was mold in his apartment. Lincoln denies each and every other allegation of Paragraph 17 of the Complaint.

18. Lincoln admits that, from time to time, Plaintiff advised Lincoln of leaks in the Roche Apartment. Lincoln denies each and every other allegation of Paragraph 18 of the Complaint.

19. Lincoln admits that its advertisements for Westfield Village included the statement that it strives to provide exemplary service in a quality home environment, that it provides 24-hour technical maintenance service to respond to emergencies, and that it has a "same-day" service request policy. Lincoln admits that the apartment brochure included the heading "Your Expectations," and elsewhere stated "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee. . . ." Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the "primary and material" reason why Roche entered into the Lease, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 19.

20. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of alleged injuries suffered by Plaintiff and/or his family, and therefore

denies same. Lincoln denies each and every other allegation of Paragraph 20 of the Complaint.

21. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning injuries allegedly suffered by Plaintiff and/or his family and the medical treatment received therefor, and therefore denies same. Lincoln denies each and every other allegation of Paragraph 21 of the Complaint.

22. Lincoln denies the allegations of Paragraph 22 of the Complaint and all subparts thereof.

23. Lincoln denies the allegations of Paragraph 23 of the Complaint.

24. Lincoln denies the allegations of Paragraph 24 of the Complaint.

25. Lincoln denies the allegations of Paragraph 25 of the Complaint.

26. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of alleged injuries suffered by Plaintiff or his wife, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 26 of the Complaint.

27. Lincoln denies the allegations of Paragraph 27 of the Complaint.

28. Lincoln denies the allegations of Paragraph 28 of the Complaint.

29. Lincoln denies the allegations of Paragraph 29 of the Complaint.

30. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 30, and therefore denies the same.

31. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of alleged health concerns and anxiety suffered by Plaintiff and his family, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 31 of the Complaint.

32. Lincoln denies the allegations of Paragraph 32 of the Complaint.

33. Lincoln admits that the Roche family moved from the Roche apartment. Lincoln admits that it provided alternative housing, free of charge, to the Roche family during this relocation at the guest suite at the Village at Potomac Falls, another property managed by Lincoln. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of confrontations Plaintiff may have had with Vernon Tatem, alleged discoveries made by Plaintiff, or alleged conversations between an unidentified "contractor" and Plaintiff, and therefore denies same. Lincoln denies each and every other allegation of Paragraph 33 of the Complaint.

34. Lincoln admits that it provided housing free of charge for Plaintiff and his family at the Village at Potomac Falls, which is managed by Lincoln. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning the living arrangements, health and relative energy levels of Plaintiff's dog and cat, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 34 of the Complaint.

35. Lincoln denies the allegations of Paragraph 35 of the Complaint.

36. Lincoln admits that, in 2001, Lincoln managed properties in Northern Virginia, in addition to Westfield Village. Lincoln admits that it had a written policy in place at that time instructing employees how to address mold in its residential rental properties. Lincoln denies each and every other allegation of Paragraph 36 of the Complaint.

37. Lincoln admits that in 2001, Lincoln managed Summit Village Apartments, now known as Roslyn Heights, located in Arlington, Virginia. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning the level of awareness possessed by any of its tenants, and therefore

denies the same. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning the state of health of its tenants, and therefore deny [*sic*] the same. Lincoln denies each and every other allegation of Paragraph 37 of the Complaint.

38. Lincoln denies the allegations of Paragraph 38 of the Complaint.

39. Lincoln admits that it temporarily provided Plaintiff and his family with housing free of charge at the Village at Potomac Falls. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning Mariba and Tatem's subjective feelings regarding job security, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 39 of the Complaint.

40. Lincoln admits that certain employees of a contractor who performed work at Summit Village wore task-specific protective clothing. Lincoln denies each and every other allegation of Paragraph 40 of the Complaint.

41. Lincoln admits the allegations of Paragraph 41 of the Complaint.

42. Lincoln denies the allegations of Paragraph 42 of the Complaint.

43. Lincoln admits that, as part of his regular duties as a floating technician for Lincoln, Plaintiff was assigned to work at various properties in Northern Virginia, including the Village at Potomac Falls and Ashburn Meadows. Lincoln denies each and every other allegation of Paragraph 43 of the Complaint.

44. Lincoln admits that Plaintiff complained to Lincoln about his perception that he was being mistreated as an employee. Lincoln admits that it terminated Roche's employment on August 16, 2002. Lincoln denies each and every other allegation of Paragraph 44 of the Complaint.

45. Lincoln denies the allegations of Paragraph 45 of the Complaint.

46. Lincoln denies the allegations of Paragraph 46 of the Complaint.

46(a). Lincoln denies the allegations of Paragraph 46(a) of the Complaint.

47. Lincoln denies the allegations of Paragraph 47 of the Complaint.

48. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any past, present or future medical expenses the Roche family has allegedly incurred or will incur, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 48 of the Complaint.

49. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations containing any medical conditions Plaintiff or his family allegedly have suffered or may suffer, including what medications they may have been prescribed, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 49 of the Complaint.

50(a). Lincoln's responses to the allegations contained in Paragraphs 1-49 are incorporated herein by reference.

50(b). Lincoln states that Paragraph 50(b) contains a conclusion of law, which Lincoln need not admit or deny. Answering further, Lincoln states that the Virginia Landlord-Tenant Act speaks for itself.

50(c). Lincoln states that Paragraph 50(c) contains a conclusion of law, which Lincoln need not admit or deny. Answering further, Lincoln states that the Virginia Landlord-Tenant Act and other statutory laws speak for themselves.

50(d). Lincoln denies the allegations of Paragraph 50(d) and all subparts thereof.

50(e). Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any medical conditions Roche or his family allegedly have suffered or may suffer, and therefore denies

the same. Lincoln denies each and every other allegation of Paragraph 50(e).

50(f). Lincoln denies the allegations of Paragraph 50(f).

50(g). Lincoln denies the allegations of Paragraph 50(g).

COUNT I (Negligence *Per se* – Lincoln and SWIB)

51. Lincoln's responses to the allegations contained in Paragraphs 1-50(g) are incorporated herein by reference.

51(a). Lincoln admits that it held itself out to the public as the property manager of Westfield Village Apartments. Lincoln denies each and every other allegation of Paragraph 51(a).

51(b). Lincoln admits that it has a contract to provide management services for Westfield Village Apartments. Lincoln denies each and every other allegation of Paragraph 51(b).

51(c). Lincoln states that Paragraph 51(c) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 51(c).

52. Lincoln states that Paragraph 52 contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 52.

53. Lincoln denies the allegations of Paragraph 53 of the Complaint and all subparts thereof.

54. Lincoln denies the allegations of Paragraph 54 of the Complaint.

55. Lincoln states that Paragraph 55 states a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 55.

56. Lincoln states that Paragraph 55 [*sic*] states a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 56.

57. Lincoln denies the appropriateness and validity of the relief requested in Paragraph 57 of the Complaint. Lincoln denies each and every other allegation of Paragraph 57 of the Complaint.

COUNT II (Breach of Lease – SWIB)

58. Lincoln's responses to the allegations contained in Paragraphs 1-57 are incorporated herein by reference.

58(a). Lincoln admits that SWIB is the owner of Westfield Village. Answering further, Lincoln states that Paragraph 58(a) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 58(a) of the Complaint.

59. Lincoln states that Paragraph 59 contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 59 of the Complaint.

59(a). Lincoln states that the lease speaks for itself. Answering further, Lincoln states that Paragraph 59(a) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 59(a) of the Complaint.

60. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning what Plaintiff knew or did not know when he entered into the lease for the Roche Apartment, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 60 of the Complaint.

61. Lincoln denies the allegations of Paragraph 61 of the Complaint.

62. Lincoln denies the allegations of Paragraph 62 of the Complaint.

63. Lincoln denies the allegations of Paragraph 63 of the Complaint.

64. Lincoln denies the allegations of Paragraph 64 of the Complaint.

65. Lincoln denies the appropriateness and validity of the relief requested in Paragraph 65 of the Complaint. Lincoln denies each and every other allegation of Paragraph 65 of the Complaint.

COUNT III (Breach of Implied Warranties - SWIB)

66. Lincoln's responses to the allegations contained in Paragraphs 1-65 are incorporated herein by reference.

66(a). Lincoln states that Paragraph 66(a) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 66(a) of the Complaint.

[66(b). Not Included in Original]

66(c). Lincoln denies the allegations of Paragraph 66(c).

67. Lincoln states that Paragraph 67 contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 67 of the Complaint.

[68. Not Included in Original]

69. Lincoln denies the allegations of Paragraph 69 of the Complaint.

70. Lincoln denies the allegations of Paragraph 70 of the Complaint.

71. Lincoln denies the appropriateness and validity of the relief requested in Paragraph 71 of the Complaint. Lincoln denies each and every other allegation of Paragraph 71 of the Complaint.

COUNT IV (Conversion - Lincoln)

72. Lincoln's responses to the allegations contained in Paragraphs 1-71 are incorporated herein by reference.

73. Lincoln denies the allegations of Paragraph 73 of the Complaint.

73(a). Lincoln denies the allegations of Paragraph 73(a) of the Complaint.

74. Lincoln denies the allegations of Paragraph 74 of the Complaint.

Lincoln denies the appropriateness and validity of the relief requested in the WHEREFORE clause of Count IV of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint fails to state a claim against Lincoln upon which relief can be granted.

Second Affirmative Defense

Plaintiff has failed to join an indispensable party pursuant to Rule 19 and the Complaint should be dismissed pursuant to Rule 12(b)(7).

Third Affirmative Defense

Plaintiff incurred no damages.

Fourth Affirmative Defense

Some or all of the damages sought by Plaintiff are not available under the causes of action he alleges.

Fifth Affirmative Defense

Plaintiff failed to mitigate his damages, if any.

Sixth Affirmative Defense

Lincoln's actions were done in good faith, without malice and without intent such that the relief sought (including but not limited to punitive damages) is not available.

Seventh Affirmative Defense

Plaintiff's claims and causes of action are barred in whole or in part because the alleged injuries and damages were caused by the acts or omissions of third parties over whom Lincoln had not control and with respect to whom it has no legal responsibility or liability.

Eighth Affirmative Defense

The wrongs alleged, if any, were justified and/or excused under the circumstances.

Ninth Affirmative Defense

Plaintiff is not entitled, on the law and/or the facts, to punitive or liquidated damages.

Tenth Affirmative Defense

Plaintiff's claim for punitive damages is barred because it violates the Excessive Fines Clause of the Eighth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and violates Article I, Bill of Rights, sections 9 and 11 of the Constitution of Virginia.

Eleventh Affirmative Defense

Plaintiff's claims and causes of action are barred in whole or in part because none of the alleged acts or omissions of Lincoln were [*sic*] the proximate cause of the injuries and damages allegedly sustained by Plaintiff.

Twelfth Affirmative Defense

The injuries suffered by Plaintiff, if any, were the result of contributory negligence and/or assumption of the risk by Plaintiff.

Thirteenth Affirmative Defense

Plaintiff's conversion claims fails [*sic*] because he consented to the taking and withholding of his personal property and he has abandoned the personal property.

Fourteenth Affirmative Defense

Plaintiff at the time of the alleged injuries was a statutory employee of Lincoln, and as such, is barred from recovery pursuant to the Virginia Worker's Compensation statute.

Fifteenth Affirmative Defense

Lincoln is entitled to equitable credit toward any judgment which might be rendered against it for any Worker's Compensation payment or award which might have been made to Plaintiff with respect to his alleged injuries or other damages.

Sixteenth Affirmative Defense

Lincoln reserves the right to plead such additional affirmative defenses as may be appropriate depending upon facts later revealed during discovery.

WHEREFORE, Defendant Lincoln Property Co. requests that the Court dismiss the claims of Plaintiff with prejudice, award Lincoln its costs and attorneys' fees, and allow Lincoln such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
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Venable, Baetjer, Howard & Civiletti, LLP
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(202) 962-4800

Counsel for Lincoln Property Co.

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[filed Jan. 6, 2003]

ANSWER OF DEFENDANT SWIB INVESTMENT CO. TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendant SWIB Investment Co. ("SWIB"), by and through undersigned counsel, hereby states as follows for its Answer to Plaintiffs' Second Amended Complaint (hereinafter the "Complaint"):

1. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 1 of the Complaint, and therefore denies the same.

2. SWIB admits the allegations of Paragraph 2 of the Complaint.

3. SWIB admits the allegations of the first sentence of Paragraph 3 of the Complaint. SWIB admits that Lincoln Property Co. ("Lincoln") develops and manages residential communities. SWIB admits that Lincoln manages Westfield Village, which is located in Fairfax County, Virginia. SWIB denies each and every other allegation of Paragraph 3 of the Complaint.

4. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 4 of the Complaint, and therefore denies the same.

5. SWIB admits that, by and through Lincoln's regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia, Lincoln has managed Westfield Village Apartments since 1996. SWIB denies each and every other allegation of Paragraph 5 of the Complaint.

6. SWIB admits the allegations of Paragraph 6 of the Complaint.

7. SWIB admits that Lincoln advertised in newspapers and in realtor brochures that Lincoln was the property manager of Westfield Village Apartments and that Lincoln was the owner and/or property manager of other apartment complexes in the Northern Virginia region. SWIB denies each and every other allegation of Paragraph 7 of the Complaint.

8. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what lessees, including Plaintiffs, knew or whether and the extent to which their dealings were exclusively through the offices and staff of Lincoln, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 8 of the Complaint.

7(b). SWIB admits the allegations of Paragraph 7(b) of the Complaint.

8. [1]SWIB denies the allegations of the second Paragraph 8 of the Complaint.

9. SWIB denies the allegations of Paragraph 9 of the Complaint.

10. SWIB admits that Christophe Roche and Juanita Roche signed a lease as respects to an apartment at 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (the "Roche Apartment"). SWIB has in-

[1] The Complaint contains two paragraphs designated as "8."

sufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what Christophe and Juanita Roche believed, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 10 of the Complaint.

11. SWIB admits the allegations of Paragraph 11 of the Complaint.

12. SWIB admits that Lincoln is engaged in the real estate investment and/or property management business. SWIB denies each and every other allegation of Paragraph 12 of the Complaint.

13. SWIB admits that Lincoln currently, and throughout the Plaintiffs' tenancy, manages Westfield Village Apartments and that SWIB owns Westfield Village Apartments. SWIB admits that Westfield Village Apartments is located in Fairfax County, Virginia. SWIB denies each and every other allegation of Paragraph 13 of the Complaint.

14. SWIB admits that Plaintiffs leased the Roche Apartment and admits that the lease stated that SWIB was the owner of Westfield Village Apartments. SWIB denies each and every remaining allegation of Paragraph 14 of the Complaint.

15. SWIB admits that Plaintiffs were residents/tenants at Westfield Village from August 1998 to May 1999 and from March 2001 to May 2002. SWIB denies each and every other allegation of Paragraph 15 of the Complaint.

16. SWIB denies the allegations of Paragraph 16 of the Complaint and specifically denies that it breached the lease.

17. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 12 [*sic*] of the Complaint, and therefore denies the same.

18. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in

Paragraph 18 of the Complaint, and therefore denies the same.

19. SWIB admits that Lincoln's advertisements for Westfield Village included the statement that Lincoln strives to provide exemplary service in a quality home environment, that it provides 24-hour technical maintenance service to respond to emergencies, and that Lincoln has a "same-day" service request policy. SWIB admits that the apartment brochure included the heading "Your Expectations," and elsewhere stated "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee. . . ." SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the "primary and material" reason why Roche entered into the Lease, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 19.

20. SWIB denies the allegations of Paragraph 20 of the Complaint.

21. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning injuries allegedly suffered by Plaintiff and/or by his family and the medical treatment received therefor, and therefore denies same. SWIB denies each and every other allegation of Paragraph 21 of the Complaint.

22. SWIB denies the allegations of Paragraph 22 of the Complaint and all subparts thereof.

23. SWIB denies the allegations of Paragraph 23 of the Complaint.

24. SWIB denies the allegations of Paragraph 24 of the Complaint.

25. SWIB denies the allegations of Paragraph 25 of the Complaint.

26. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of alleged injuries suffered by Plaintiff or his wife, and therefore denies the

same. SWIB denies each and every other allegation of Paragraph 26 of the Complaint.

27. SWIB denies the allegations of Paragraph 27 of the Complaint.

28. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of Plaintiff and his family's state of awareness, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 28 of the Complaint.

29. SWIB denies the allegations of Paragraph 29 of the Complaint.

30. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 30, and therefore denies the same.

31. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of alleged health concerns and anxiety suffered by Plaintiff and his family, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 31 of the Complaint.

32. SWIB denies the allegations of Paragraph 32 of the Complaint.

33. SWIB admits that the Roche family moved from the Roche apartment. SWIB admits that Lincoln provided alternative housing, free of charge, to the Roche family during this relocation at the guest suite at the Village at Potomac Falls, another property managed by SWIB. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of confrontations Plaintiff may have had with Vernon Tatem, alleged discoveries made by Plaintiff, or alleged conversations between an unidentified "contractor" and Plaintiff, and therefore denies same. SWIB denies each and every other allegation of Paragraph 33 of the Complaint.

34. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 34 of the Complaint.

35. SWIB denies the allegations of Paragraph 35 of the Complaint.

36. SWIB admits that, in 2001, SWIB managed properties in Northern Virginia, in addition to Westfield Village. SWIB has insufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 36, and therefore denies the same.

37. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning the allegations in Paragraph 37, and therefore denies the same.

38. SWIB denies the allegations of Paragraph 38 of the Complaint.

39. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning Mariba and Tatem's subjective feelings regarding job security, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 39 of the Complaint.

40. SWIB admits that certain employees of a contractor who performed work at Summit Village wore task-specific protective clothing. SWIB denies each and every other allegation of Paragraph 40 of the Complaint.

41. SWIB admits the allegations of Paragraph 41 of the Complaint.

42. The allegations in Paragraph 42 of the Complaint are not directed against this defendant. SWIB denies the allegations of Paragraph 42 of the Complaint.

43. The allegations in Paragraph 43 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 43 and therefore denies same.

44. The allegations in Paragraph 44 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to

form a belief as to the truth or falsity of the allegations in Paragraph 44 and therefore denies same.

45. The allegations in Paragraph 45 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 45 and therefore denies same.

46. The allegations in Paragraph 46 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 46 and therefore denies same.

46(a). SWIB denies the allegations of Paragraph 46(a) of the Complaint.

47. SWIB denies the allegations of Paragraph 47 of the Complaint.

48. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any past, present or future medical expenses the Roche family has allegedly incurred or will incur, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 48 of the Complaint.

49. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations containing any medical conditions Plaintiff or his family allegedly have suffered or may suffer, including what medications they may have been prescribed, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 49 of the Complaint.

50(a). SWIB's responses to the allegations contained in Paragraphs 1-49 are incorporated herein by reference.

50(b). SWIB states that Paragraph 50(b) contains a conclusion of law, which SWIB need not admit or deny. Answering further, SWIB states that the Virginia Landlord-Tenant Act speaks for itself.

50(c). SWIB states that Paragraph 50(c) contains a conclusion of law, which SWIB need not admit or deny.

Answering further, SWIB states that the Virginia Landlord-Tenant Act and other statutory laws speak for themselves.

50(d). SWIB denies the allegations of Paragraph 50(d) and all subparts thereof.

50(e). SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any medical conditions Roche or his family allegedly have suffered or may suffer, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 50(e).

50(f). SWIB denies the allegations of Paragraph 50(f).

50(g). SWIB denies the allegations of Paragraph 50(g).

COUNT I (Negligence *Per se* – SWIB [*sic*] and SWIB)

51. SWIB's responses to the allegations contained in Paragraphs 1-50(g) are incorporated herein by reference.

5l(a). SWIB admits that Lincoln held itself out to the public as the property manager of Westfield Village Apartments. SWIB denies each and every other allegation of Paragraph 51(a).

51(b). SWIB admits that Lincoln has a contract to provide management services for Westfield Village Apartments. SWIB denies the allegations of Paragraph 51(b).

51(c). SWIB states that Paragraph 51(c) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 51(c).

52. SWIB states that Paragraph 52 contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 52.

53. SWIB denies the allegations of Paragraph 53 of the Complaint and all subparts thereof.

54. SWIB denies the allegations of Paragraph 54 of the Complaint.

55. SWIB states that Paragraph 55 states a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 55.

56. SWIB states that Paragraph 55 states a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 56.

57. SWIB denies the appropriateness and validity of the relief requested in Paragraph 57 of the Complaint. SWIB denies each and every other allegation of Paragraph 57 of the Complaint.

COUNT II (Breach of Lease – SWIB)

58. SWIB's responses to the allegations contained in Paragraphs 1-57 are incorporated herein by reference.

58(a). SWIB admits that it is the owner of Westfield Village. Answering further, SWIB states that Paragraph 58(a) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 58(a) of the Complaint.

59. SWIB states that Paragraph 59 contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 59 of the Complaint.

59(a). SWIB states that the Lease speaks for itself. Answering further, SWIB states that Paragraph 59(a) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 59(a) of the Complaint.

60. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning what Plaintiff knew or did not know when he entered into the lease for the Roche Apartment, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 60 of the Complaint and specifically denies that there were latent defects in the apartment.

61. SWIB denies the allegations of Paragraph 61 of the Complaint.

62. SWIB denies the allegations of Paragraph 62 of the Complaint.

63. SWIB denies the allegations of Paragraph 63 of the Complaint.

64. SWIB denies the allegations of Paragraph 64 of the Complaint.

65. SWIB denies the allegations of Paragraph 65 of the Complaint.

COUNT III (Breach of Implied Warranties – SWIB)

66. SWIB's responses to the allegations contained in Paragraphs 1-65 are incorporated herein by reference.

66(a). SWIB states that Paragraph 66(a) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 66(a) of the Complaint.

[66(b). Not Included in Original]

66(c). SWIB denies the allegations of Paragraph 66(c).

67. SWIB states that Paragraph 67 contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 67 of the Complaint.

[68. Not Included in Original]

69. SWIB denies the allegations of Paragraph 69 of the Complaint.

70. SWIB denies the allegations of Paragraph 70 of the Complaint.

71. SWIB denies each and every other allegation of Paragraph 71 of the Complaint.

COUNT IV (Conversion – SWIB)

72. SWIB's responses to the allegations contained in Paragraphs 1-71 are incorporated herein by reference.

73. SWIB denies the allegations of Paragraph 73 of the Complaint.

73(a). SWIB denies the allegations of Paragraph 73(a) of the Complaint.

74. SWIB denies the allegations of Paragraph 74 of the Complaint.

Lincoln denies the appropriateness and validity of the relief requested in the WHEREFORE clause of Count IV of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint fails to state a claim against SWIB upon which relief can be granted.

Second Affirmative Defense

Plaintiffs incurred no damages.

Third Affirmative Defense

Some or all of the damages sought by Plaintiffs are not available under the causes of action he alleges.

Fourth Affirmative Defense

Plaintiffs failed to mitigate their damages, if any.

Fifth Affirmative Defense

SWIB's actions were done in good faith, without malice and without intent such that the relief sought (including but not limited to punitive damages) is not available.

Sixth Affirmative Defense

The wrongs alleged, if any, were justified and/or excused under the circumstances.

Seventh Affirmative Defense

Plaintiffs are not entitled, on the law and/or the facts, to punitive or liquidated damages.

Eighth Affirmative Defense

Plaintiffs' Complaint as against SWIB fails because it did not cause the harm they suffered, if any.

Ninth Affirmative Defense

The injuries suffered by Plaintiffs, if any, were the result of contributory negligence and/or assumption of the risk by Plaintiffs.

Tenth Affirmative Defense

Plaintiffs' conversion claims fails [*sic*] because they consented to the taking and withholding of their personal property and they have abandoned the personal property.

Eleventh Affirmative Defense

Count III (Breach of Implied Warranties – SWIB) of the Complaint is barred by this Court's order dismissing said claim with prejudice.

Twelfth Affirmative Defense

Punitive damages may not be awarded since they violate the Equal Protection and Due Process Clauses of the United States Constitution

WHEREFORE, Defendant SWIB Investment Co. requests that the Court dismiss the claims of Plaintiffs with prejudice, award SWIB its costs and attorneys' fees, and allow SWIB such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ MICHAEL R. GOODSTEIN
Michael R. Goodstein (Bar No. 31700)
Arter & Hadden LLP
1801 K Street, N.W., 3rd Floor
L Street Entrance
Washington, D.C. 20006
(202) 775-7108

OF COUNSEL:
Richard A. Dean, Esq.
Arter & Hadden LLP
1801 K Street, N.W., 3rd Floor
L Street Entrance
Washington, D.C. 20006
(202) 775-7965

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant.

[filed Feb. 7, 2003]

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND PLEADINGS

I. INTRODUCTION:

The plaintiffs were injured by the landlord's breach of its duties to not injure its tenants. Discovery and depositions have revealed that the negligent acts and the intentional tort alleged were done in a wilful, or wanton, or in a manner evincing a conscious disregard for the rights of plaintiffs and others.

This case was initially filed in September, 2002, in the Fairfax County Circuit Court on a pleading entitled, Motion for Judgment, which had punitive damage claims. The matter was removed to this Court where Motions to Dismiss were argued. An Amended Complaint was filed to which there was no objection, but plaintiffs did not pray for exemplary damages in that Amended Complaint. However, discovery has disclosed the following reasons to permit leave of Court to amend the pleadings to conform to the evidence:

REASONS FOR JUSTIFICATION OF EXEMPLARY/PUNITIVE DAMAGE CLAIMS

1. Numerous complaint [*sic*] were made by the plaintiffs of water leakage and moisture problems in their apartment over a six month period. Service requests were made by the plaintiffs to have the problems relieved, and the defendants were on notice of mold accumulation. Notwithstanding having a very strictly adhered to mold policy, and notwithstanding defendant, Lincoln, claiming that they offered 24-hour immediate response to service calls, the mold hazardous conditions remained over many months. The complaints of the tenant plaintiffs resulted in retaliatory actions against the defendant in his employment and a disregard of the Landlord/Tenant Act applicable to this situation which was done intentionally and with ill-will or spite against the tenants.

2. Even with the knowledge of the hazardous conditions at the apar nent complex, the defendants kept secret from other tenants in the building the hazardous conditions. The defendants knew of the health risks they were exposing their tenants, but went on a course of intentionally withholding this information from the tenants (See attached Exhibit 1).

3. The defendants went on a course of reprisal against the plaintiff, Christophe Roche. They made personal attacks upon his character and took actions to intimidate him from making complaints or finding out about the dangers to which his family was exposed.

4. During the same period of time that these acts described above were occurring at the apartment complex where the plaintiffs lived, within months before and perhaps during the tenancy of the plaintiffs, a similar cover-up of hazardous mold conditions was being conducted at another Lincoln property apartment complex, namely, Summit Village in Arlington, Virginia. (See Exhibit 1) There, tenants were exposed to dangerous levels of toxic mold. This information was given to the plaintiffs by maintenance workers who had worked at that other

location and knew of that occurrence, and eventually told the plaintiffs of this.

5. Lincoln put together a regional maintenance policy that ordered all of its maintenance staff to carefully inspect for and find any water or moisture intrusion in the apartment complexes, specifically trying to locate mold. This policy advised the defendant staff to "protect company assets" rather than be concerned with the risks to which the tenants were exposed. The policy was carried out in order to avoid exposure of the mold to avoid litigation and lawsuits, rather than care about the duty to inform and protect the tenants from hazardous conditions.

6. In violation of the Virginia Landlord/Tenant Act, the tenancy of the plaintiffs was terminated earlier than permitted. This Act requires that under §55-222 120 days should be given to the tenant when the tenant is removed for rehabilitation reasons. Defendant did a remediation and construction with rehabilitation on the apartment of the plaintiffs but did not grant the 120 days, instead making them have only an extension of 45 days.

7. Plaintiff, Christophe Roche, was an employee of defendant, Lincoln, working in the maintenance department. Because of his complaints and eventually finding out about the abuses described above, he was fired from his job under a pretext of him taking documents out of the office. The allegation was that among these documents was the mold policy which the defendant believed would give information to help with a possible claim against the landlord by Mr. Roche, as a tenant. In fact, the documents came into possession by way of a third-party who was employed by Lincoln as well. In effect for "whistle blowing" and filing a complaint, the plaintiff was terminated.

8. The defendant, Lincoln, further retaliated against the plaintiffs by abusing and refusing to grant COBRA and frustrating his efforts to receive health benefits. The defendants knew of the injuries that the plaintiff was suffering because he had notified them of time that he had to

take off to seek treatment for skin lesions, sinus conditions and other problems related to toxic exposure.

9. Discovery had revealed that defendant, Lincoln, punished other maintenance staff, terminating them as well, for making disclosures of information to the plaintiff.

10. Discovery and documentation produced so far has shown that defendant, Lincoln, attempted to cover-up the independent test done by its own tenant in finding toxic mold by conducting a test that didn't even evaluate air samples in the same rooms and areas that the plaintiff had complained; and this information was pointed out to them in plaintiffs' own Environmental Report on where the toxic mold was found, and given to defendants by plaintiffs.

11. Discovery has revealed that other tenants, as well as these plaintiffs, were advised that all of their personal belonging could be remediated and safely returned. Defendant, Lincoln, did such an incompetent and poor job that the plaintiffs learned that clothing that had been returned to another evacuated neighbor living above them still had dangerous levels of spores in all of the porous materials and belonging.

12. The defendants knew or should have known that the Stachybotrys and other toxic molds produced spores that could get into porous materials, and then when exposed to moisture or water, re-generate other spores that once against start the whole process. In essence, all the clothing, upholstery, and wallboard, substrate and other materials in these complexes are subject to the condition reoccurring and having the building and its inhabitant at risk once again.

13. The types of mold found in the plaintiffs' apartment are the same dangerous toxins that are used in chemical weaponry. There is documentation that animals, and particularly a study on horses who have eaten this type of toxic mold, die from this myotoxin. The literature accepted in the scientific community and even in the reports relied upon by defendants' own experts agree that

there are adverse health effects from being exposed to these same toxins. Their own literature and documents provided in discovery show that there is reactive airway disease and sinus and skin irritations, all of which are symptomatic in the plaintiffs. Notwithstanding all of these dangers, and the fact that the dangers probably still exist in the referenced apartment complexes, defendant, Lincoln, continues to deny the existence of the hazard. The method of surreptitiously trying to "bleach out" or do "general maintenance" clean-ups have been and continue to be a complete failure to remedy the situation. Additionally, they have hired what appears to be incompetent remediation crews who have been accused by many of the tenants during the remediation process of stealing jewelry, taking valuables, and destroying the personal belongings of these tenants.

LEGAL ARGUMENT

Rule 15 permits the Court to liberally grant leave to amend pleadings and "shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice the party maintaining the party's action or defense upon the merits." This Rule even goes so far as to say that even at trial, if there is a variance in the evidence and the issues raised in the pleadings, the Court may grant leave to amend.

Because there was such a lengthy and detailing of these facts in the originally filed Motion for Judgment putting the defendants on notice of all these matters; and because the initial Motion for Judgment filed in the Circuit Court of Fairfax County did in fact request punitive damages, it is respectfully submitted that the defendants cannot claim surprise. Furthermore, prior to filing the lawsuit in an attempt to resolve the claim of Mr. and Mrs. Roche, a copy of the pleading and a full description of why exemplary damages could be awarded was presented to counsel for Lincoln.

Plaintiffs request that they be permitted to amend the pleading to allege that the actions of the defendants, as set forth in the Amended Complaint, "were done with a conscious disregard for the rights of the plaintiffs." In Virginia, punitive damages are awarded when malice, which is defined as "ill-will, malevolence, grudge, spite, wicked intention, or conscious disregard for the rights of another" are shown. *Lee v. Southland Corp.*, 219 Va. 23, 244 S.E.2d 756, 759 (1978). Here, there is plenty of evidence of ill-will, grudge, spite, and with all due respect, even wicked intention leveled against these plaintiffs. The proof elicited even to this point would justify the standard of "a conscious disregard for the rights of another."

> "Punitive damages, the purpose of which is not so much to compensate the plaintiff but to punish the wrongdoer and to warn others, may be recovered 'only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others.'" *Hamilton Development Company v. Broadrock Club, Inc.*, 245 Va. 40, 45, 445 S.E.2d 140 (1994) (quoting *Giant of Virginia, Inc. v. Bigg*, 207 Va. 679, 685, 152 S.E.2d 271, 277 (1967), in referencing as authority *Pueant v. Dickens*, 245 Va. 217, 219, 427 S.E.2d 340, 342 (1993)).

The plaintiffs request that the Amended Complaint be amended so it alleges that the defendants acted with "ill-will, malevolence, grudge, spite, wicked intention, or a conscious disregard of the rights of another."

Respectfully submitted,

CHRISTOPHER ROCHE
JUANITA ROCHE
By Counsel

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703) 385-2745
Virginia State Bar Number: 9211

[certificate of service omitted]

Summit Village Apartments

From: "Melvin Bryan" <MBryan@lpsi.com>

To: "Lincoln at Fairoaks MID-ATL APTS" <lincolnatfairoaks@erols.com>; <mtlaurelcrossing@erols.com>; <mty1@erols.com>; <NJsouth@erols.com>; <applebriar@lincolnapts.com>; <ashfordmeadows@lincolnapts.com>; <harbourgates@lincolnapts.com>; <LibertyPark@lincolnapts.com>; <liberty Park@lincolnapts.com>; <lincolnatfairoaks@lincolnapts.com>; <lincolnwoods@lincolnapts.com>; <mayfaire@lincolnapts.com>; <mgrfairfaxcorner@lincolnapts.com>; <mgrgatesofmclean@lincolnapts.com>; <mgrhermitage@lincolnapts.com>; <mgr potomacfalls@lincolnapts.com>;<mgrpotomacplace @lincolnapts.com>; <mgrpotomacyard@lincolnapts.com>; <mgrsenecaclub@lincolnapts.com>; <njnorth @lincolnapts.com>; <opmanager@lincolnapts.com>; <riverpointe@lincolnapts.com>; <senecaclub@lincolnapts.com>; <summitvillage@lincolnapts.com>; <Treetops@lincolnapts.com>; <Villageat foxpoint@lincolnapts.com>; <westfieldvillage@ lincolnapts.com>; <windsoratfairlakes@lincolnapts.com>

Cc: "Diana Penn" <dianapenn@erols.com>; <summit villagemaint@hotmail.com>; <opmaintenance@lincolnapts.com>;"Glenn O'Brien" <GOBRIEN@lpsi.com>; "Rick Leith" <LEITH@lpsi.com>; "Lana Zylka" <lzylka@lpsi.com>; "Peggy Reynolds" Preynolds@lpsi.com>

Sent: Wednesday, July 11, 2001 10:52 AM

Attach: Mold PM walk sheets.xls

Subject: Important Policy Change

Business Managers – Please print for the Lead Technicians

In response to the mold situation that is sweeping the nation, it has become necessary for LPC to become even more pro-active in protecting the assets, investors, asset management groups and our own interest from exposure to this type of liability. Right or wrong, the way we used to handle leaks and mold problems in property management is gone forever. Mold can develop from various sources such as roofs, plumbing, appliances, etc. In the case of Stachybotrys, when the mold reproduces it develops toxic spores and an unhealthy environment.

Therefore, it is extremely important that each community conduct a unit by unit inspection for mold and sources of leaks. If you have not yet conducted your 3rd quarter filter changes, now would be the ideal time to do it. It is advisable to notify the residents that we will be checking every sink, toilet, hot water heater, patio/balcony storage rooms, HVAC closets. The notice should not mention mold but rather that we are conducting leak checks.

I know this is a busy time of the year but this needs to get started as expeditiously as possible. Communities close together can combine staffs to make the process go much quicker. I have attached a PM form that is the only form to be utilized during these inspections.

I will need a report from each property as to when this process will start and I will need copies of all documentation throughout the process. I might also make you aware that the Quarterly On-Site Inspection form has been revised for check off for this inspection and other mold related issues totaling 75 points.

Thanking you in advance for your support and cooperation.

Melvin Bryan
Regional Maintenance Director
703 834-1900
MBryan@LPSI.com

Summit Village

Memo

To: Service Technicians
From: Manager
cc: Melvin Bryan and Andi Rothestein
Date: 02/14/02
Re: HVAC closet check

Per the owners request there will now be a new policy. Please check the HVAC closets for any signs of moisture when you conduct a service ticket only if the resident is NOT home. If moisture is detected please report it to Jo Gavigan immediately.

LHC employees to wear Safety Eqmt
- We are to remove valuables for them:
  to include money
  jewerly
  guns
  documents
- we are to get all clothing + linens dry cleaned and/ or laundered
- Resident can bring 3-days of clothes @ $500 each (per person)
- we are to do itemized list of all belongings (video tape), have resident sign off on
- change locks for residents protection
- Belongings to be cleaned + stored here on property. Access through office.
- ≈ 6 wks
- Okay to terminate lease
- Document all conversations
- Melven
  bullet form March 8 to just facts today

Dianna McGaughey

From: "Melvin Bryan" <MBryan@lpsi.com>
To: <westfieldvillage@lincolnapts.com>
Sent: Friday, January 18, 2002 1:13 PM
Subject: Letter

Diana,

Pursuant to the items noted in the letter, I recommend that you incure [*sic*] the expense to: l) that we get contractor bids to inspect the window for a siding/molding/caulking problem 2) Have the tub enclosure professionally regrouted – I do not want any water to penetrate and come into contact with the affected drywall/wood again 3) Have the tubs professionally glazed (refinished) 4) replace baseboard and quarter round in blue BR 5) Insure that Sam of S&S Carpet uses an enzyme on the carpet after all repairs, the live organism will kill any mold spores in the carpet 6) With exception of the items indicated above plus the carpet tack and drywall repairs, all other functions should be repaired in-house. Advise Brima that I will check status around Tuesday.

With regards to him meeting the RPM, there should be no need once all issues are resolved.

Melvin

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff,
v.

LINCOLN PROPERTY CO., ET AL.,
Defendant.

February 13, 2003

DEPOSITION OF:
FRED E. CHANEY

was called for examination by Counsel for the Plaintiff, pursuant to Notice, taken at the law offices of Jerry M. Phillips, Esquire, Phillips, Beckwith, Hall & Chase, 10513 Judicial Drive, Suite 100, Fairfax, Virginia 22030, commencing at 1:10 p.m., on the 13th day of February, 2003, before Mary Silverthorne, a Notary Public in and for the State of Virginia, at Large, when were present on behalf of the respective parties:

* * * * *

[4] PROCEEDINGS

Thereupon,

FRED E. CHANEY

the witness, called for examination by Counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. PHILLIPS:

Q Would you please state your name and address?

A Fred Chaney, 4028 Centenary – that's C-e-n-t-e-n-a-r-y – Dallas, Texas.

Q And would you please tell us what your occupation is and your position?

A I am property manager for Lincoln Property Company and Senior Vice President.

Q And do you sit on the board of Lincoln Property?

A We're a partnership. I am a partner in new deals. We don't have a board.

Q And this is a limited liability corporation or company?

A We have multiple structures that we [5] operate under.

Q And where is the corporate headquarters?

A Dallas, Texas.

* * * * *

[18]

* * * * *

Q Now, Lincoln, as you say, is a partnership?

A Yes.

Q And with its headquarters in Dallas, how many employees work for Lincoln Properties Partnership?

A Can you dissect the difference between commercial and residential? If you can, I can answer that. If you can't, I can't, because I don't know.

Q What is your knowledge – what would your knowledge be in, residential?

A Purely residential.

Q What would that be?

A And I am –

MS. BERTRAM: Objection, vague. Go ahead.

THE WITNESS: Approximately 2000 employees.

* * * * *

[21]

* * * * *

Q Now, this is not traded – is it – on any stock exchange?

A No.

Q And it is not a publicly offered entity since it is a partnership. Am I correct?

A Correct.

* * * * *

[28]

* * * * *

Q Besides managing some of these properties, do you also own some of them – complexes?

A We're in partnerships. Various Lincoln partnerships are in ownership – various Lincoln partners are partners in partnerships that own assets.

Q Okay. What percentage of the apartments that Lincoln Properties manages are also subject to partnership ownership?

A Approximately 25%.

Q Westfield Village is one of the Virginia properties?

A Yes.

Q Is that – and you know that is owned by SWIB?

A That is correct.

Q Is there any partnership arrangement with that?

A No.

* * * * *

[66]

* * * * *

MR. PHILLIPS: Okay. And I am going to show you what I will be asking to be marked as Number Nine.

(Thereupon, Exhibit Number Nine was marked for identification.)

BY MR. PHILLIPS:

Q It is entitled Company Mission Statement. Would you look at that? Does that appear to be accurate?

A Uh-huh. (affirmative) That is correct.

Q Was that in effect – it has been in effect for how long?

A I think this mission statement has been in effect for a couple years.

MR. PHILLIPS: Okay. I show you one other. Off the record.

(Thereupon, Exhibit Number Ten was marked for identification.)

MR. PHILLIPS: I will represent that I took these off of the website also today.

(Thereupon, remarks were made off the record.)

[67] BY MR. PHILLIPS:

Q Number Ten has a list of clients in alphabetical order. Even though – I'm telling you that I – or I represent to you that I took this off today, February 13th. But this is not a complete list – is it – of all the clients?

A I can't tell you. I don't know. I mean it, in general, lists most of our clients.

Q Would Invesco be one of them that should have been listed here?

A I don't know why not. Invesco is.

Q It is?

A Uh-huh. (affirmative)

Q Which one is? Oh, yeah Invesco, Realty. It is listed. I apologize. And do you know how many more should be listed that aren't on here?

A Again, generally, that is a representation of the bulk of our clients. 70% or 75% of the buildings that we manage are owned by third parties, some of which are individual owners.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Feb. 14, 2003]

DEFENDANT LINCOLN PROPERTY CO.'S SUPPLEMENTAL ANSWERS TO PLAINTIFF CHRISTOPHE ROCHE'S FIRST SET OF INTERROGATORIES

* * * * *

In addition to its General Objections, Defendant objects to this Interrogatory on the grounds that it purports to impose requirements different from or in addition to the Federal Rules of Civil Procedure and the Rules of the United States District Court for the Eastern District of Virginia. Subject to and without waiving its General and Specific Objections, Defendant will produce the expert disclosures required by the Federal Rules and the Local Rules pursuant to and within the time frames established by those rules.

SUPPLEMENTAL ANSWER TO INTERROGATORY No. 15

Subject to and without waiving its General and Specific Objections, see Defendants' expert disclosures pursuant to Rule 26(a)(2).

AFFIRMATION

I, Jeff B. Franzen, hereby certify and affirm, under the pains and penalties of perjury, that I am the Senior Vice President/Partner for Defendant Lincoln Property Co. ("Lincoln"), that I am authorized to act for Lincoln, that the facts set forth in these Supplemental Answers to Plaintiff Christophe Roche's First Set of Interrogatories have been assembled at my direction, with the assistance of authorized employees and counsel for Lincoln, and that the assertions therein are true and correct to the best of my knowledge, information and belief. Lincoln reserves the right to supplement its responses to the extent that subsequent discovery should reveal any additional facts not currently known to Lincoln. Executed this 14th day of February 2003.

/s/ JEFF B. FRANZEN
Jeff B. Franzen
Senior Vice President/Partner

[signature block and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Feb. 14, 2003]

DEFENDANT LINCOLN PROPERTY CO.'S SUPPLEMENTATION OF INITIAL DISCLOSURES PURSUANT TO RULE 26(a)(1)

* * * * *

Lincoln expressly reserves all objections to the use and admissibility of any of the categories of documents identified in these Initial Disclosures. Moreover, Lincoln reserves any objections it may have to the production of these categories of documents under the Federal Rules of Civil Procedure, the Federal Rules of Evidence, or any privileges or protections that may be available under federal or state statutory or common law.

I. 26(a)(1)(A):

In compliance with Rule 26(a)(1)(A), Lincoln lists below the names, addresses, and telephone numbers of individuals who are likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings:

Name	Address	Topics
John LeBeau Vice President Lincoln Property Co.	Contact through counsel for Lincoln only.	Leases between the Roches and SWIB Roches' service requests Lincoln's response to service requests Alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village Remediation of the Roches' apartment Handling and storage of the Roches' personal property
Jeff B. Franzen Senior Vice President/Partner Lincoln Property Co.	Contact through counsel for Lincoln only.	Alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village Remediation of the Roches' apartment Handling and storage of the Roches' personal property
Lana Zylka (Former) Regional Manager Lincoln Property Co.	Contact through counsel for Lincoln only.	Lease between the Roches and SWIB Roches' service requests Lincoln's response to service requests Alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village Remediation of the Roches' apartment

* * * * *

[signature block and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

ORDER

THIS MATTER is before the Court on Plaintiffs', Christophe Roche, et al., motion to voluntary [*sic*] dismiss Count II pursuant to Federal Rule of Civil Procedure 41(a)(2). For the reasons stated in open court on February 21, 2003, it is hereby

ORDERED that Plaintiffs' Motion to Voluntary [*sic*] Dismiss Count II Pursuant to Federal Rule of Civil Procedure 41(a)(2) is GRANTED. It is further

ORDERED that, should Plaintiffs re-file a claim similar to Count II, they shall bear attorneys' fees for all parties in this litigation as to that count.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 10th day of March, 2003.

/s/ GERALD BRUCE LEE
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
03/10/03

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[filed Mar. 13, 2003]

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO BAR TESTIMONY BY RICHARD BERNSTEIN, M.D. AND FOR SUMMARY JUDGMENT ON ALL CLAIMS FOR PERSONAL INJURY

[text, signature block, and certificate of service omitted]

* * * * *

4.0 RESULTS

4.1 Visual inspections

A visual inspection of the interior of unit 104 was conducted which revealed evidence of significant repairs to the walls of the HVAC closet and the front bathroom (near main entrance). These repairs had been conducted to repair damage from a major water leak which resulted from the deterioration of the water piping within the walls. During the time of the inspection the water leak near the HVAC closet had been repaired and there was no indication of wetness on the drywall. The walls of the front bathroom were also dry. Visible mold growth was observed on the ceiling of the HVAC closet, the interior of the HVAC unit duct work and inside the walls of the front bathroom. In addition mold growth was observed on the inside surface of drywall installed around the baseboard of the linen closet, and the north wall of the bedroom behind the HVAC closet. Mold growth was also observed around the edges of all the bedroom windows which was the result of water entering the living space of the unit from outside.

4.2 Bulk Sampling

A total of two bulk samples were collected from areas of visible mold growth which included the HVAC closet ceiling, the fiberglass insulation inside the HVAC ductwork. The results of analysis for these samples can be seen in the table below.

Table 4.2
Bulk Sampling Results

Sample ID	Location	Fungal Species Identified	Percentage of sample	Results (cfu/g)*
CR0224BLK01	HVAC closet ceiling	Stachybotrys Chartarum (atra)	98%	4.0×10^6 cfu/g
		Cladosporium species	1%	
		Penicillium species	1%	
CR022402BLK02	HVAC unit inside duct	Penicillium	79%	1.3×10^6 cfu/g
		Cladosporium	12%	
		Ulocladium	7%	

* cfu/g – colony forming units per gram

4.3 Air Sampling

A total of four air samples were collected at the subject site. These included 2 air samples collected via the Anderson sampler onto 10 cm malt extrose agar (MEA) plates and 2 samples collected on glass microscope slides with a Burkard sampler. The results of analysis for these samples including the sampling time and volume can be seen in the table below.

Table 4.3
Burkard Air Sampling Results

Sample ID	Location	Fungal Species Identified	Number of spores per cubic meter (spores/m³)	Total spores per cubic meter (spores/m³)
CR0224BKD0C	Living Room	Cladosporium	308 spores/m³	1672 spores/m³
		Ascospores	44 spores/m³	
		Smuts, Periconia, Myxometes	44 spores/m³	
		Stachybotrys	1056 spores/m³	
		Hyphal elements	176 spores/m³	
		Ep[illegible]cum	44 spores/m³	

CR0224BKD09	Outdoor patio	Cladosporium	22 spores/m³	352 spores/m³
		Basidiospores	22 spores/m³	
		Colorless	22 spores/m³	
		Unknown	242 spores/m³	
		Hyphal elements	22 spores/m³	
		Torula herbarum	22 spores/m³	
All sample results are based on a sampling volume of 90 litres				

Table 4.3a
Anderson Air Sampling Results

Sample ID	Location	Fungal Species Identified	Percentage of sample	Results colony forming units per cubic meter (cfu/m³)
CR0224BIO07	Living Room	Stachybotrys Chartarum (atra)	98%	640 cfu/m³
		Aspergillus sp. (multiple types)	28%	
		Cladosporium	22%	
		Aspergillus versicolor	11%	
CR022402BIO08	Outdoor patio	Cladosporium species	88%	270 cfu/m³
		Sterilia mycelia	12%	
All sample results are based on a sampling volume of 28.3 litres				

4.4 Wipe Sampling

A total of three wipe samples were collected from the interior of Unit 104. These included samples from the HVAC unit drain pan, the inside of the linen closet baseboard drywall, and the inside of the bathroom baseboard drywall. The results of analysis for these samples including the surface area wiped can be seen in the table below.

Table 4.4
Wipe Sampling Results

Sample ID	Location	Fungal Species Identified	Percentage of sample	Results colony forming units per square inch (cfu/in²)
CR022402WPE03	HVAC closet drain pan	Penicillium	77%	13,000 cfu/in²
		Ulociadium	15%	
		Yeast	8%	
CR022402WPE04	Linen Closet (inside of baseboard drywall)	Penicillium species	72%	130,000 cfu/in²
		Aspergillus sp. (mixed to include A. niger)	24%	
		Trichoderma	4%	
CR022402WPE05	Front bathroom near entrance	Aspergillus	52%	23,000 cfu/in²
		Stachybotrys Chartarum (atra)	17%	
		Chaetomium	13%	
		A. versicolor	9%	
All sample results are based on an area sampled of 1 square inch (in²)				

5.0 CONCLUSIONS

Based on a review of the analytical data, visual observations, and interviews with the occupants of Unit 104 it is concluded that a significant amount of past water leakage was the most likely cause of toxigenic mold growth and contamination that has occurred within unit 104 and that the level of this contamination may be extensive, or covering an area greater than 32 ft². Exact measurements of the total amount of surface area with visible mold growth could not be obtained during the investigation because it occurred within enclosed wall spaces which could not be accessed.

In addition it is also apparent that the occupants of Unit 104 have been continuously and repeatedly exposed to toxigenic fungal spores during their most recent period of occupancy. The types of fungal spores identified within

the sampled air of the space include known toxigenic species that are well documented such as *Stachybotrys chartarum (atra)* which also appear in wipe, and bulk samples collected from other surfaces within the unit. The presence of airborne fungal spores is also an indication that they are distributed widely throughout unit 104 and that the carpeting, and other fabric surfaces within the unit have also been contaminated by the settling of airborne fungal spores via natural processes out of contaminated air. These spores then become a source of chronic potential dermal contact through normal use of the unit and a potential source of chronic inhalation exposure from re-entrainment of the spores into the breathing zones of the occupants depending on the amount of foot traffic or other activity in the area. The exposure scenario is further complicated by the HVAC system of the unit which recirculates the air within the space on a regular basis. This creates turbulent air which provides the energy necessary for a larger amount of disturbed fungal spores to remain airborne longer than they normally would under quiescent conditions with little or no air disturbance.

While the severity of exposure is difficult to estimate, and no direct link between the occupants' health complaints and their exposure can be shown through the methods of this investigation, consideration should be given to the fact that the occupants' health complaints which included, headaches, sore throats, hair loss, irritation of the respiratory tract, fatigue, and dermatitis are all consistent with well defined case studies of chronic trichothecene intoxication. This is a powerful mycotoxin specifically produced by *Stachybotrys Chartarum (atra)*, a species of toxigenic fungi, in addition to others, proven to be present within unit 104.

6.0 RECOMMENDATIONS

Based on the conclusions reached above the following recommendations are made:

- Submit blood serum and urine samples for detection of mycotoxin, endotoxins, or any other mold toxin that may be present or their metabolic by-products.
- Evacuate the unit to prevent further exposure to airborne toxigenic fungal spores.
- Collect additional archival bulk samples of carpeting and fabrics within unit 104 for possible later use in isolating mycotxins [*sic*], endotoxins, or other toxic fungal metabolic byproducts.
- Collect additional archival vacuum samples of carpeting and fabrics within unit 104 for possible later use in isolating mycotxins [*sic*], endotoxins, or other toxic fungal metabolic byproducts.
- Perform additional carpet and fabric sampling to further define and document exposure conditions and levels of potential exposure within unit 104.
- Inform the property management firm responsible for maintenance of the property that toxigenic fungal growth has occurred with unit 104 in order for them to take appropriate measures at preventing other individuals or families resident within the complex from being exposed in a similar manner. These measures include but are not limited to:
  - Performing a review of established procedures for preventing and eliminating mold growth within living units.
  - Performing a survey of the occupied units within the property to identify any units potentially impacted in a similar manner.
  - Developing an appropriate remediation plan for affected areas of Unit 104 to eliminate the sources of toxigenic fungal spores which include the walls, carpeting and HVAC system, or any other affected surface.
  - Restricting employee access to unit 104 to only those authorized persons wearing appropriate

personal protective equipment (PPE) consisting of HEPA filtered negative pressure air-purifying respirators and tyvek suits.

* * * * *

Mold Investigation Report 5111 Woodmere Dr., Unit 104
3/17/02 2:59 PM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed Mar. 24, 2003]

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[text, signature block, and certificate of service omitted]

* * * * *

Transcription of taped meeting on 03-26-2002 with Representatives of Lincoln, SWIB, and Invesco

Transcription of meeting taped on 03-26-2002 between Mr. Roche and representatives for Invesco, Lincoln, and SWIB.

Persons heard on tape are:

1. Mr. Christophe Roche – Resident of 5111 Woodmere Dr. #104 Centreville Va. 20120

2. Mr. John Lebeau – Regional Vice President for Lincoln properties in metro D.C. area

3. Mr. Glen O'Brien – Regional property manager in northern VA.

4. Mr. Fred Chaney – Senior Vise [*sic*] President of Lincoln property Company (from Dallas Texas)

5. Mr. Ken Kaminski – Executive with Invesco Real estate advisors and representing SWIB (also from Texas).

The parties on this transcript will be identified by there [*sic*] first names for the rest of this document.

Begin transcription:

Chris: Hey!

Glen: You Chris?

Chris: yea.

Glen: Hey, Glen O' Brien.

Chris: Good to meet you, Glen.

Ken: Chris, Ken Kamenski with Invesco , how ya doin'?

Chris: Good to meet you, Ken.

John: John Lebeau, Chris.

Chris: Hi, John.

Fred: Hey, you got everybody here, Fred Chaney.

Chris: Hi Fred.

Fred: How are you?

(Laughter)

Fred: Name (unclear) is on his way.

Ken: Sorry we're late but this shouldn't take a whole lot of time I wouldn't think (Numerous persons talking, unclear . . . gathering to table)

Ken: Chris, I don't know, do you know much about Invesco?

Chris: ah I know very little about ah, the entire Lincoln company, I've only been with them for a little over ninety days

Ken: Let me just give you a brief. Invesco is the adviser for the owner of the apartment where you reside and umm I've come in here for property inspections and I'll be here until tomorrow. I've received, I guess, the most resent [*sic*] letter that you and your wife

Chris: Uh huh

Ken: . . . that uh you handed into the office and consequently that went up to our office, and went to various people and I guess I'm just gonna umm sort of peruse it with you but uh basically the collective word was we can agree to about most of it. There's two points that we can't.

Chris: O.K.

Ken: In order for us to begin the remediation to get your stuff back we need you to sign off on that

Chris: Uh huh

Ken: 1 thru 5 we can, we can say o.k. to, doable but 6 and 7 are the two items we can not

Chris: 0.k. and uh you provide a guarantee

Ken: No

Chris: That our stuff will be microbe free

Ken: and the reason behind that is (muffling) you're always gonna have microbes

Chris: Uh huh

Ken: No matter where and Invesco, the owners, I don't think you'll ever get a guarantee or warrantee [*sic*] on the microbial

Chris: Well I think, I think we need to be a bit more specific obviously we're talking about the three toxic microbes that are in there um obviously there is pollen in the air there's other molds out there in the environment. What we're concerned with is the, is the uh the bad stuff. So, we can certainly refine that to indicate that if that's what we need to do.

Ken: Let me give you a (unclear) recommendation on that and again I'm leaving to go home so discuss with your wife where you want to go with this. Let me recommend that on items six and seven, if you have any doubt in you're [*sic*] mind and your [*sic*] not willing to say you know delete it –

Chris: uh huh

Ken: Let me recommend that you give it to your attorney and we give it to our attorney and let them work out the details

Chris: ok.

Ken: Ok ? We are not going to be able to work with in your apartment until you ease of [*sic*] that.

Chris: Ok.

Ken: ok?

Chris: Ok that's agreeable.

Ken: ok good.

Fred to Ken: Does he have your attorneys info?

Chris: ah yes?

Ken: Let me give it to you, you got a pencil? His names [*sic*] Ken lapintene

Chris: Could you spell the last name for me?

Ken: L-A-P-A-T-I-N-E

Chris: ok.

Ken: At Greenburg and Trarig, Greenburg G-R-E-E-N-B-U-R-G and traurig T-R-A-U-R-I-G and you need his number its [*sic*] 212-801-3189.

Fred to Ken: Do you have his attorneys name?

Ken: ummmm.

Chris: And that's for Invesco right?

Ken: yes.

Chris: ok.

Ken: I didn't think we have verification of your attorney, do you have one or?

Chris: yes. Yea hold on one second and I'll give you that.

Ken: let me tell you is it Phillips, Beckwith, hall, and Chase?

Chris: Yes, Jerry Phillips.

Ken: Ok and there [*sic*] in Fairfax Va (703)-691-4100.

Chris: uh huh That's it.

Ken: Judicial Drive suite 100, got ya.

(call over radio)

Ken: I think it's better than for me to negotiate more on 6 and 7 all I can tell you is were [*sic*] we are at and while I respect your reason for writing that I am no attorney in terms of coming up with any kind of acceptable language that would make me feel comfortable

Chris: Right, neither am I so,

Ken: So on those two items, definitely one the one for sure ah were [*sic*] you want to be able to go in there and suit up

Chris: Right when I, when I meet with ah um with Melvin and uh I guess it was Barco and Core that was one of the things they suggested we could do to ah to get a couple of the sentimental items and have them hermetically sealed so but I guess that's, That's changed now so.

Ken: no we've (not understandable) the locks and nobody really can get in there so we can resolve

Chris: Right.

Ken: our issues so.

Fred: You know on a on a bigger picture issue here I don't think we can make that guarantee on any issue

Chris: um hm

Fred: you know because as ken talked about aaa umm this problem if you wana [*sic*] call it one's been around for thousands a [*sic*] years

Chris: un huh

Fred: and tell you or any body else that its [*sic*] gonna be completely microbe leer [*sic*] free and I don't know what words you used an [*sic*] you know we cant [*sic*] do that

Chris: um hum

Fred: aahhhh cant [*sic*] do it on that unit and probably cant [*sic*] do it on any unit so um

Ken: same thing with your (not understandable) that comes by I mean you can you can infect them with that it being on your clothes right now going to the hotel and you could be infecting it with the (not understandable).

Chris: un huh. Yea I think I think like you suggested umm turning it over to the attorneys probably for them to come up with ah ah an appropriate and agreeable situation is probably best.

Ken: Ok.

Fred: well since an attorney is involved ah have you you you remembered you signed a arbitration agreement when you went to work for the company you

Chris: na I don't recall anything like that.

Fred: ya probably aught [*sic*] to you aught [*sic*] to give him a copy of what he signed so he makes his attorney aware of it. You know from my stand point I am curious to know if your [*sic*] willing to talk about it you know I mean. This surfaced you know ten days ago and it's a it's a serious matter or we all wouldn't be here and you know we've

been diligent in our process I am curious to know why an attorney is involved

Chris: um hum

Fred: you know if we weren't willing to do anything then I would understand somebody like you going to get attorney, but uh just for future reference we insure that we have policies and programs that protect people like you I'm I'm curious to know why why if your [*sic*] willing to talk about it why an attorneys [*sic*] involved.

Chris: I would be, I am sure once I talk to him um if he ok's it um I would be willing to talk, but he say's no at this point you know he's advised me that any communication as far as this situation questions you just asked and so on and so forth needs to be addressed with with him present so.

Ken: Ok then I recommend give that to him but I want to ask if you would do me a favor, I still need a copy of the report from Potomac that says that there is (not understandable) issues

Chris: um hum

Ken: um is there any way that I can get a copy from you.

Chis: yea, let me give him a call and see if he's got he's got all the copies of that so let me give him a call.

Speaker unidentified: marry your s [*sic*] up with his attorney.

Chris: That's what I'll do.

Fred: you know ah if ah you [*sic*] motives are to get problems fixed is one thing. If your motives are caution for lawsuit that's something else and if were [*sic*] working in concert to get the problems solved we aught [*sic*] to be able to have a copy of whatever somebody's told you is the problems that exist

Chris: un huh

Fred: ummm (not understandable) when you went to wok [*sic*] for us you signed a [*sic*] arbitration agreement (not

understandable) so you need to make your attorney aware of that.

Chris: yes, well I uh, we've already discussed all of that and I think the stance on that is this has nothing to do with my employment with Lincoln, um you know we were residents there long before I ever agreed to go to work for Melvin.

Fred: (not understandable) again that's a, they will let the attorneys –

Chris: Right. Right.

Ken: (not understandable) if we were to remove all the guns.

Chris: umhm

Ken: Can you tell me what is it you want?

Chris: Right.

Ken: And that's where everybody's scratching their heads saying "ok where are we going with this" and I cant [*sic*] explain that, all I can do is say I am making a [*sic*] effort to remedeate [*sic*] it.

Chris: umhm

Ken: got em out and in hotels and abating the rent, doing everything (not understandable) do. But still got cog's [*sic*] in the wheels here. So I am left with the representatives saying why what does he want? Cause if he wants something come get it. (Not understandable) it all out, get to the bottom of it, or am I just spinning my wheels trying to fix something that

Fred: cant [*sic*] be fixed.

Ken: cant [*sic*] be fixed! Can you answer that?

Chris: At this point I cant [*sic*] answer anything,

Ken: All right.

Chris: I will communicate with him (pointing to jerry's information) I am sure that he will be more than willing to effectively communicate to ken exactly where we are, exactly everything that's going on. I, like you, am on the other side of the fence as you guys,

Ken: I know that, I understand.

Chris: And um you know.

Ken: Can you tell me what, I understand, can you tell me what possessed you to hire Potomac, do you know Potomac?

Chris: um from my dealings with them in this situation is how I know them. But I cant [*sic*] I cant [*sic*] um,

Ken: And health issues (not understandable)?

Chris: I cant um go any further into it than that at this point.

Fred: Any reason why you didn't tell us that uh of what you suspected you were exposed to.

Chris: You were notified, you guys were notified, as a matter of fact you were notified via letter in January so uh

Fred: Do we have a copy of that letter?

Chris: yea, you should, you should.

Ken: Can I ask you who –

Chris: as a matter of fact the letter went to Dianna and a copy of the letter went to Melvin so, and Melvin was involved in the situation back then so I don't know what kind of information that you guys have got from you [*sic*] side of things but um

Ken: Ok all right thanks uh,

Chris: Well it goes back actually a lot further than that so my suggestion with out really being able to say much is you guys should have a a complete file on our history from the time we moved in there um and you should have those letters as well as the service request, and everything else in that file on our apartment. I would um I would say look thru that, you will get a clear picture if you guys haven't already got the chance to look thru it.

Ken: I very much appreciate it, may I rely on you if in the event, and keep in mind uh where we don't want to go adversarial with you. I like you on the other side of the fence. I know this is your current employer and I employ

Lincoln on the property and then the owners you know the owner –

Chris: Right

Ken: uh kind of so called somewhat neutral and this is all new to the whole real estate, I mean we've heard about it but, can I rely on you if in the event the paper work that you should of went in is not around, can I get a copy?

Chris: Um I don't think that he would have a problem giving you guys a copy of that. I don't.

Ken: Can I ask for it now?

Chris: I don't have it.

Ken: No, I mean ask for it and assume that its [*sic*] not around.

Fred: (Not understandable)

Ken: I would love to have it.

Chris: I will I will speak with him, and and um see what he has to say, but I don't, once again I am not a lawyer so I don't know, but I don't think he would have a problem providing something that you guys have already been given. As a matter of fact um I cant [*sic*] imagine that that document is missing because there was a response document um or several response documents to it so.

Ken: I am just asking ya I am going to go back (not understandable) you know what we don't have it or it went in to a black hole so maybe that happened, maybe, maybe not and it may be there I am just since we are face to face you know you can produce it it sure would be great. More importantly produce the report from Potomac, that one there has got everyone looking for it and since they've gone above and beyond now with barco and core and also hired the attorneys.

Chris: Now you seen [*sic*] obviously the um analytical data from Potomac right?

Ken: I have seen nothing.

Chris: You don't have a copy of the analytical data that was sent over from them, that's already been provided to Melvin as well.

Ken: I am going to I am going to reserve,

Fred: can you make a list of to the best of your recollection of everything that you think that you have given us?

Chris: Sure.

Fred: Because again clearly were were, this is, the only thing we have from you that we know of from our level is your is your letter the seven point letter we got here.

Chris: Well I would assume,

Ken: I got a letter from you and your wife a copy of the letter that says hey we want to approve barco nobody else in there that was written I think,

Chris: did you get the letter before that?

Ken: which was?

Chris: Which was when we were called in and we met with Melvin and I am sorry Lana, lona, about um I guess it was Tuesday of last, Thursday of last week, about them coming in and cleaning the apartment and sending our clothes off to the drycleaner?

Ken: And that was the letter where you said hey I don't want you guys doing that,

Chris: Right.

Ken: we did get that (not understandable)

Chris: you did get that?

Ken: That's the other letter I received from you then the next letter was,

Chris: Now before that is what I am talking about which is the analytical data and Melvin had that with him at that, at this particular meeting, and that's the site map of the unit.

Ken: Was the analytical data this?

Chris: That's it!!!

Ken: This right here, yea. I, I cant [*sic*] read it this one sheet of paper.

Chris: ok.

Fred: (ask a question not understandable)

Chris: Yea, I will give him a call he's got all of that.

Ken: Yea I got it but I don't know what it says (not understandable) environmental testing um just a diagram I guess I am looking for results and maybe that's what it says with in this.

Chris: yes with in all of those blocks there are the specific analytical data of the molds, of the counts, so on and so forth.

Ken: Ok ok.

Chris: which is I am assuming what you guys are looking for,

Ken: I guess just a legible one, that's a fax of a copy, what have you that's not going to show thru.

Chris: sure, sure.

Ken: now you haven't sent anything else other than you've given that, and you say prior to that in January and maybe going back whenever during your occupancy which I'll assume is coming up on year?

Chris: past a year yea, this month.

Ken: um that you have given it in to the office, correspondence.

Chris: Yes, numerous.

Ken: ok. I am not an attorney, numerous meaning one, two, three, more?

Chris: um, you know off the top of my head I would say that there should be probably eight or nine umm different service request in the file as well as the letters.

Ken: (not understandable) should be?

Chris: yes, as a matter of fact I got the copies umm from the file from the office,

Ken: You do!?

Chris: so they should be there.

Ken: No, no personal letters to Dianna or anything like that?

Chris: Oh yea, there's a personal letter that's the one I am talking about there's a I would say ah the January letter is probably a total of about seven pages. And that was the one that was that was the one that was sent to Dianna as well as a copy was given to Melvin, Melvin Bryant.

Ken: That's the one I want! That ought to be very helpful to understand where you're coming from. Now Melvin understand Melvin may ask you the same thing when I go back there and start to ask where this is and where that is (not understandable).

Chris: Got ya.

Ken: Ok are there any questions that you have of me or anything?

Chris: Not at this point no.

Ken: I am leaving tomorrow, I will be leaving out of this office to go to the other property so I will be there (not understandable).

Fred: When are we going to find out what you want.

Chris: Umm I would imagine my attorney is taking care of all that so um I would say fairly soon, once again I am not a [*sic*] attorney so um. At this point were [*sic*] focusing on on taking care of our health and getting back to to a suitable stance.

Fred: (not understandable)

Chris: yes. yea, we've – we've definitely had health issues from this so um and like I told Melvin when I met with him last week umm as well as when this all broke um that right now has been our primary concern. Ofcorse [*sic*] getting the stuff remedeated [*sic*] or what can be salvaged remediation is uh important to us as it would be any family but uh it's it's taking a far back seat to the other issues were [*sic*] trying to deal with right now so. Umm I'm not pressed and that's why in our letter we said

we understand as far as taking care of the safety and the welfare of the other people living around us umm do what you got to do if that means you have to move all our stuff out into storage containment units or what ever until we can get these other issues resolved, that's fine but honestly right now that's been kind of uh a back plate issue for me. Were you going to ask something?

Ken: I was going to say umm, and you may have been asked this on the property in (not understandable) can you tell me if you have insurance, renters insurance, do you guys have a policy of renters insurance at all, and the reason I say that is your [*sic*] going to be called on by an adjuster from our side,

Chris: I've already gotten the call yea, today, yea referred it to our attorney. Yea someone called and I gave her the attorneys [*sic*] name and all.

Ken: there [*sic*] going to come in their [*sic*] going to look at it and do what insurance people do, and I anticipate that they are going to also ask you the same questions that I meant to ask.

Chris: what's that?

Ken: Do you have renters insurance?

Chris: No.

Ken: Ok. I don't have anything else, you guys have anything?

Fred: Well you know were [*sic*] sorry you're having to go thru it.

Chris: I appreciate that, that's the first apology I've actually received so.

Fred: no – nobody wants to have to go thru it umm you know, I know its [*sic*] not fun uhh you know and – and we didn't uhh you know certainly from a corporate stand point in the event uhh if you did give us notice then umm we apologize about that to because uhh you know I mean as I said when I made my first comment this stuffs [*sic*] important I mean you know invesco's out spending ya know hundreds of thousands of dollars potentially uhh ya

know trying to do do and do what's right uhh and uhh uhh and that's the reason I wanted to come because by all means we want to be sure we have a policy that's in place that is you know good for our employees and uh in (not understandable) and were [*sic*] sorry you're having to go thru it.

Chris: I appreciate that.

Fred: If we had it to do over again then we try you know,

Ken: I second that and I know its [*sic*] awkward you being here, you probably feel like you're tag teamed.

Chris: you know, I mean I understand no I understand that you – you have

Fred: were [*sic*] not, were [*sic*] not, were [*sic*] not trying to tag team you, you know I'm here to (not understandable) to be sure again you know the policy makers for our company to be sure we write practices here that that work you know and that uh uhh

Ken: Both you need to write it down, I flew in Monday thinking that (not understandable) meeting –

Fred: Yea, johns got a (not understandable)

Ken: But I come in like quarterly or on a [*sic*] as needed basis and since this is at the forefront I am trying to get educated as anybody else is on this whole thing so.

Chris: Yea, I am at a loss for, to be honest with you for who any of you are but I am assuming your [*sic*] John Lebeau,

Ken: Yes, He's God of you,

Fred: I'm Fred Chancy, out of the Dallas office and I'm at the head of the company,

Ken: We're the (not understandable)

Fred: John, John works for me.

Ken: Invesco, Invesco is a Invesco mutual funds but there,

Chris: a [*sic*] asset management company,

Ken: Yes a [*sic*] asset management company, who then overlaps Lincoln and then the owners.

Chris: Ok, well then I will give him a call as far as these – do you have a number that you want these sent to or do you just them sent to your attorney?

Ken: Umm actually it would be great if you sent them to the attorney, now your [*sic*] talking about what?

Chris: Umm the umm the full report from Potomac environmental plus the because a bunch of pages from the microbial lab with the analysis and all.

Fred: If you can give copies make multiple copies at least two so you can make john and our group aware particular from my stand point more than any thing we want to understand what uhh you know you wrote you said on your seven page letter and didn't get any action back when did you say, January.

Chris: right well yea that letter was in response to a lack of action for quite some time but once again that's going back to that's going back to the file and going thru all that but if you want to give me numbers where you want this stuffs sent to and I can pass that on to him.

Ken: My fax number is 972-715-5816 my name is Ken last name is K-A-M as in Michael I-N-S-K-I and that's Invesco I-N-V-E-S-C-0 we, it would be helpful since everybody's kind of circling and talking I think it would be appripoe [*sic*] for a copy to be sent to Ken since your [*sic*] going to be talking anyway.

Chris: to who?

Ken: Ken Lapintine from Greenburig and then most important as well as myself would be. What were [*sic*] talking about Over [*sic*] to your office?

John: Over to my office.

Chris: Ok what's?

John: 703-834-6394

Ken: And again I am looking for any and all corispondance [*sic*] and what I'm looking for most is the full report of Potomac umm legible that I can see the spaces.

Chris: How do you spell your last name?

John: L-E-B-E-A-U.

Chris: I should have Know [*sic*] that took four years of French, got a French chef for a father so I should have known how to spell that. And then you are?

Fred: I am Fred Chaney C-H-A-N-E-Y

Chris: I've got the fax and everything on here.

Ken: I really apreciate [*sic*] you taking time to see us and I apoligize [*sic*] as well for the whole scenario and being late,

Chris: That's all right.

Ken: I mean time wise I'm not wearing a watch but I do know we made every effort we just were held at Westfield's and,

Chris: Well they keep me plenty busy here so that's not a problem.

Glen: I told him it would be sometime before lunch.

Chris: yea, I know what your [*sic*] saying there was no diffenat [*sic*] time so you asked me what time I took lunch and I said I don't typically take lunch I work straight thru so when ever you guys get here is fine so.

Ken: I will give you the rate that we obviously want to get to see the light at the end of the tunnel and I leave you with that.

Chris: Ok

Ken: now what ever way witch [*sic*] that is (not understandable) or if it's negoeation [*sic*] (not understandable)

Chris: right right.

Ken: that's my desire.

Chris: right, now obviously at this point where does,?

Fred: we want to get back at this point I mean do we know what you want.

Ken: yea I didn't put a time table cause I'm sure when your attorney talks to our attorney then I'll be going back to talk to (not understandable) they'll probably not want this to drag on for weeks, they'll probably want to say hey

how can we fix these few last items and one more time and what will make everybody feel confortable [*sic*] so we can get in and get this thing done. And in my mind it should be yesterday.

Chris: yea, I mean as far as the the as far as the number number seven on there that's an easy address we don't need to go in there I can tell them what the items that they've already told us in the last meeting that could not be saved that we want to have hemetrically [*sic*] sealed and they can bag the up and tripple bag them like our environmental guy said can be done for transport and we can take them over to this place that does the hernetric [*sic*] sealing and they can deal with it from there, um there [*sic*] whole thing with that was last time I met with them he said look if there's a few personal item's that you want to get out of there we can suit you up you can go in there you can grab them we can bag them up, which is why I put that in there. I don't care if I go, I'd prefer not to go back in there even if I'm fully suited up. As long as we can get –

Ken: we cant [*sic*] let you go in there but we may be able to take some of the items – have you provided a list?

Chris: no, its [*sic*] four items it's a file-locked file box, it's my wife's bouqet [*sic*] from our wedding in September that cant [*sic*] be saved, or ring pillow, and a [*sic*] old pink stuffed animal that's on my sons bed that was my wife's when she was a kid.

Ken: say again – file box, ring pillow,

Chris: Her bouqet [*sic*] –

Ken: Her bouqet [*sic*] –

Chris: yea theres [*sic*] a couple bouquets in there but hers is umm I'd have to get the colors from her which was hers but –

Ken: Ok then what else?

Chris: and then a [*sic*] old umm floppsey Charlie, a [*sic*] old doll an old stuffed pink dog that's on my sons [*sic*] bed.

Ken: a stuffed pink dog.

Chris: yea.

Ken: I'll work on this and get file box, ring pillow, bouqet [*sic*], old stuffed –

Chris: the file box the ring pillow the bouquet and the and the stuffed animal.

Ken: and the stuffed pink dog! Would one know where the file box is?

Chris: yea it's in the closet, it's setting [*sic*] in the closet actually by her wedding dress

Ken: Ok and the ring pillow is in there?

Chris: No, it's in a uhh curio in one of the big lit book shelves in the living room.

Ken: Bouqet? [*sic*]

Chris: it's there to.

Ken: Ok umm

Chris: It's like a shelf set up with all that stuff.

Ken: and the old stuffed pink doll is in your son [*sic*] room?

Chris: It's on the bunk bed yea back in the third bedroom.

Ken: Ok I think –

Chris: and basically what were [*sic*] looking for is just to have them –

Ken: encapsulated temporarly [*sic*]

Chris: encapsulatd temporarly [*sic*] until we can get it to this place that we found that does hemetric preservation that basicly [*sic*] seals stuff. So nothing can get out but obviously it's sentimental stuff so.

Ken: I think I can work that out I cant [*sic*] garentee [*sic*] let me make some phone calls –

Chris: right

Ken: and either way it goes will you give us a phone number or?

Chris: yea, the number here is umm let me get it from them actually

Glen: 703-

Chris: No, in my unit here

Ken: oh ok.

Chris: I've got to get it from some one out front here. Hey Ben do you have the phone number for the guest suite that I'm staying in here.

Response: umm yea I have it out front wasent [*sic*] on the phone?

Chris: no not on the phone, I got it once two weeks ago and gave it out to a couple of people but its 421 something.

Response: Does it work.

Chris: yea the two people I gave the number to have called me so we've got a [*sic*] answering machine on there now.

Response: you should be there the rest of the month

Chris: probably a lot longer than that. I am sure you'll get a [*sic*] update at some point

Response: what ever you want it doesn't matter to me, we love it admins paying so I'm smiling do you know what I mean. Were [*sic*] happy that somebodys [*sic*] in it because were [*sic*] paying like almost four hundred dollars a month for that crappy furniture in there.

Chris: I'd talk to them about that.

---(long pause)---

Chris: come on I don't want to keep the president of the company waiting here.

Response: If you want to go back in there I'll uhh knock on the door and bring it back in just a minute I mean.

Chris: It's allright it gives me a breather.

Response: (different voice) umm 703-421-6186

Chris: 421-1760 Ok thanks I aperacate [*sic*] it.

Chris: ok its [*sic*] 703-

Ken: this is?

Chris: This is the phone number where I'm staying and weve [*sic*] got a computerized answering machine on there if were [*sic*] not there.

Ken: Ok 703

Chris: 421-1760

Ken: now what I'm going to do is like I said is get back and make phone calls see what I can do on this and weather [*sic*] I can or I cant [*sic*] I'll leave you a message and tell ya if I can or cant [*sic*] do it, ok umm that's it I don't have anything. I know I keep saying that.

John: I apreceate [*sic*] this and I apologize for it

Chris: No problem.

Fred: ok good to see you

Chris: Ok!

Question: was that allright?

Chris: yea, yea apreceate [*sic*] it thank you.

End of transcription

VERY IMPORTANT ——— (NEXT CTRLY AUGUST + SEPTEMBER)

Summit Village Apartments

From: "Melvin Bryan" <MBryan@lpsi.com>
To: "Lincoln at Fairoaks MID-ATL APTS" <lincolnatfairoaks@erols.com>; <mtlaurelcrossing@erols.com>; <mty1@erols.com>; <NJsouth@erols.com>; <applebriar@lincolnapts.com>; <ashfordmeadows@lincolnapts.com>; <harbourgates@lincolnapts.com>; <Liberty Park@lincolnapts.com>; <libertyPark@lincolnapts.com>; <lincolnatfairoaks@lincolnapts.com>; <lincolnwoods@lincolnapts.com>; <mayfaire@lincolnapts.com>; <mgrfairfaxcorner@lincolnapts.com>; <mgrgatesofmclean@lincolnapts.com>; <mgrhermitage@lincolnapts.com>; <mgrpotomacfalls@lincolnapts.com>; <mgrpotomacplace@lincolnapts.com>; <mgrpotomacyard@lincolnapts.com>; <mgrsenecaclub@lincolnapts.com>; <njnorth@lincolnapts.com>; <opmanager@lincolnapts.com>; <riverpointe@lincolnapts.com>; <senecaclub@lincolnapts.com>; <summitvillage@lincolnapts.com>; <Treetops@lincolnapts.com>; <Villageatfoxpoint@lincolnapts.com>; <westfieldvillage@lincolnapts.com>; <windsoratfairlakes@lincolnapts.com>
Cc: "Diana Penn" <dianapenn@erols.com>; <summitvillagemaint@hotmail.com>; <opmaintenance@lincolnapts.com>; "Glenn O'Brien" <GOBRIEN@lpsi.com>; "Rick Leith" <LEITH@lpsi.com>; "Lana Zylka" <lzylka@lpsi.com>; "Peggy Reynolds" <PReynolds@lpsi.com>
Sent: Wednesday, July 11, 2001 10:52 AM
Attach: Mold PM walk sheets.xls
Subject: Important Policy Change

April Aug

212

Business Managers- Please print for the Lead Technicians

In response to the mold situation that is sweeping the nation, it has become necessary for LPC to become even more pro-active in protecting the assets, investors, asset management groups and our own interest from exposure to this type of liability. Right or wrong, the way we used to handle leaks and mold problems in property management is gone forever. Mold can develop from various sources such as roofs, plumbing, appliances, etc. In the case of Stachybotrys, when the mold reproduces it develops toxic spores and an unhealthy environment.

Therefore, it is extremely important that each community conduct a unit by unit inspection for mold and sources of leaks. If you have not yet conducted your 3rd quarter filter changes, now would be the ideal time to do it. It is advisable to notify the residents that we will be checking every sink, toilet, hot water heater, patio/balcony storage rooms, HVAC closets. The notice should not mention mold but rather that we are conducting leak checks.

I know this is a busy time of the year but this needs to get started as expeditiously as possible. Communities close together can combine staffs to make the process go much quicker. I have attached a PM form that is the only form to be utilized during these inspections.

I will need a report from each property as to when this process will start and I will need copies of all documentation throughout the process. I might also make you aware that the Quarterly On-Site Inspection form has been revised for check off for this inspection and other mold related issues totaling 75 points.

Thanking you in advance for your support and cooperation.

Melvin Bryan
Regional Maintenance Director
703 834-1900
MBryan@LPSI.com

Today

-waiting for 104's approval

Jason - physical inspections
no prior notice, leave card in apt
take photos of work as it is done

2 units, isolated
further inspections

! Do not distribute or make reference to the policy !

Ken will be out M-W @ 12 noon
↳ Saturday

Only Invesco talks to attorneys
Meet to Rotn w/ Invesco

- Dryclean everything or launder everything
not both, one or the other
If something is damaged it would get replaced

PCO clearing process

- Get another storage unit for questionable items

Redacted

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AFFIDAVIT

STATE OF VIRGINIA
COUNTY OF FAIRFAX, to-wit:

I, Diana Coleman, after having been first duly sworn according to law, state under oath, as follows:

On February 19, 2003, I called Jerry M. Phillips about a recent development with the leaks we had discussed with him the previous weekend, as well as the other problems that we had with Lincoln. These leaks had been ongoing since November of 2002, approximately one month after my husband and I moved in. Service staff have failed to address or correct these problems to this date. Upon this most recent leak on Tuesday evening, February 18, 2003, to Wednesday, February 19, 2003, the leak was producing buckets of water. They sent Melvin Bryan to my unit to investigate. When I spoke with Mr. Bryan after he presented himself with his card, and I questioned him, he stated that he knew nothing about any leak problems at our unit, or that there had been any problems in the past, and that he or they, meaning Lincoln, had to decide what to do in the unit. I used numerous towels and other items to try to sop up the water as it was leaking, and keep the leak from spreading all throughout our unit. The water reached the linen closet where last weekend it was discovered that toxic mold still existed in the walls. Mr. Ginste, of Potomac Environmental, performed that test. The responding service technician originally blamed the leak on the air conditioning unit which was odd because I don't use my air conditioner: it is the middle of winter, and shortly after a huge snow storm. When my husband and I looked to identify exactly where the leak was coming from, we opened the door and looked inside the HVAC closet and saw that the leak was coming from where the pipes come out of the wall on the right hand side. We pointed this out to Gilbert, the responding service technician, and Gilbert said he didn't need to knock the wall down. Then a call came through from someone named Joe

to knock it down. Now, the wall has been knocked down and the pipes are exposed. Lincoln brought in three large industrial fans to dry out the unit. The carpet has been torn up and the padding has been torn up from the floor to try to get the cement dry. Upon looking in the HVAC closet when we were talking with Mr. Phillips on the telephone, my husband noticed a very strong mildew smell coming from the large hole that had been knocked in the wall of the HVAC closet. This is the same location that we've been experiencing leaks since approximately last November. My husband and I would like to be removed from this unit and placed in a safe and habitable dwelling. We are here only temporarily until our home in Culpeper, Virginia, is completed. It is currently under construction. Our short time spent in this unit operated by Lincoln has been a nightmare. We have turned in numerous service requests to Lincoln for items needing repair and have received no satisfactory responses or repairs for most of these items. We were never informed that our unit had been subject to a remediation for toxic mold exposure just before our occupancy. Instead, when we looked at the unit and prepared to sign the Lease, Lincoln told us that the previous tenants before us had trashed the unit and knocked holes in the walls, etc., and that Lincoln had to do extensive amounts of repairs to get it ready for the new tenants, ourselves. This day we have now been informed that toxic molds are still present in the same locations as when the Roche family lived here prior to the remediation. Laboratory tests have confirmed these facts.

/s/ Diana Coleman (SEAL)

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

Subscribed and sworn to before me in the jurisdiction aforesaid this 20th day of February, 2003.

[notary omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

Tuesday, February 11, 2003
Fairfax, Virginia

Deposition of:

WILLIAM RAY TRAVELSTEAD

a witness, called for examination by counsel on behalf of the Plaintiffs, pursuant to notice, taken at 10513 Judicial Drive, Suite 100, Fairfax Virginia 22030, beginning at approximately 4:30 o'clock p.m., before Gustave G. LaCroix, Jr., Verbatim Reporter and Notary Public in and for the Commonwealth of Virginia, at Large, when there were present on behalf of the respective parties:

* * * * *

[30]

* * * * *

BY MR. PHILLIPS:

Q Did you – But you didn't participate in fixing it up, though?

A Not do any of that, no.

Q You and Mr. Roche used to talk about your work; did you not?

A Yes.

Q Did Mr. Roche tell you about his problems that he was having with water leakage and water intrusion in his apartment?

A He mentioned something about the leak.

Q Did he tell you about the mold in his apartment?

A Yes.

Q What did he tell you about that?

A I don't recall, but I – he did say something.

Q But you and he had conversations about that, didn't you?

A Yes.

Q Now, did you ever discuss with him the mold policy of Lincoln?

[31] A We probably did.

Q Okay. Did you ever discuss about whether it was right or wrong to not tell the residents, that is the tenants, about having mold discovered in their units?

MS. VOSSLER: Objection.

BY MR. PHILLIPS:

Q Did you have conversations about that?

A Yes.

Q Okay. And both of you thought it was not proper not to tell the tenants; didn't you?

A Yes.

MS. VOSSLER: Objection.

BY MR. PHILLIPS:

Q The answer is yes; right?

A Yes.

Q And do you remember any other comments that you and he used to discuss about, you know, those mold problems besides of what I've just talked about?

A No.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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* * * * *

[17]

* * * * *

[BY MR. PHILLIPS:]

Q Did you ever see a – or memo that you saw that said don't tell the tenants about the mold; just go and fix their HVAC units?

A Yes.

Q And did the policy or the memo say don't do this when the tenants are at home?

A I think it said don't check – if you – When you go in to do a work order, don't check the HVAC closet if the resident is at home.

Q Why?

A They didn't say why. They just said –

Q Told you not to do it in front of them?

A Yes.

Q And so most of the checking, if you did it, you had to wait until they weren't around?

A Correct – or you won't – you just didn't check it.

Q Until they were gone?

A Well, you wouldn't go back, unless they [18] put in another work order.

Q Now, when you worked on mold or removing it yourself and you used this beach [*sic*] solution, did you tell the tenant when they weren't there that you [*sic*] removing mold?

A When they weren't there?

Q Yes.

(Whereupon, the witness gestured with his head.)

MR. PHILLIPS: Did you ever go back and tell them?

THE COURT REPORTER: I'm sorry. I'm sorry. You shook your head in the negative. Did you tell them –

MR. PHILLIPS: I'll rephrase the question. Yes, he did.

MS. VOSSLER: You have to give a verbal answer.

THE WITNESS: Okay.

BY MR. PHILLIPS:

Q When you went in to fix the mold, on the times you did it, were the tenants there?

A I'm sure they were at some point.

[19]

Q Did you ever tell them what you were doing?

A No.

Q And wasn't it the policy of Lincoln, the mold policy, not to discuss those issues with the tenants?

A. Correct.

* * * * *

LPC employees to wear Safety Eqmt

book
- We are to remove valuables for them:
  to include money
  jewerly
  guns
  documents

- we are to get all clothing + linens dry cleaned and/ or laundered

- Resident can bring 3-days of clothes @ $500 each (per person)

- we are to do itemized list of all belongings (video tape), have resident sign off on

- change locks for residents protection

- Belongings to be cleaned + stored here on property. Access through office.

- ≈ 6 wks

- Okay to terminate lease
- Document all conversations
- Melven
  bullet form March 8 to today
  just facts

March, 20, 2002

To: Westfields Village, Lincoln property Company
Regional Property Manager
Regional Director of Maintenance

As per our conversation this evening March 20th, 2002, regarding the remediation of our personal property as well as the apartment at 5111 Woodmere Dr #104, we do not give our consent for any attempt at remediation of our personal property until we know it can be achieved, and will be done properly. We will need the name of the qualified company, Their Adderss [*sic*], phone number, a contact person and what qualifications they have to handle this type of situation. A full report on the methodology they plan to implament [*sic*], as well as information and references proving their systems [*sic*] ability to provide a complete remediation.

Further exposure to ourselves and family is not a risk we are willing to take, therefore upon receiving this information we will review it with the appropriate parties and inform you of our decision.

We understand that in order to protect the safety and health of our neighbors in building 5111 you need to begin the remediation prosses [*sic*] on apartment #104. Knowing this, we give our permission only to relocate our property into a storage unit with the understanding that you are liable for any damaged or missing items. A full inventory of our personal property will need to be performed as it is removed, so arrangments [*sic*] will need to be made with us to achieve this. Please be aware that many of the items are antiques, collectables and/or sentamental [*sic*] from of [*sic*] wedding and other occasions, these items are unable to be replaced so please use care when moving them.

In closing, let this serve as notice, Our personal property is Not to be removed until arrangements have been made by you with us for a complete inventory, and No at-

tempt at remediation is to be performed on our personal property until you have received our written and signed approval based on our review of the company information required above.

Signed,

/s/ JUANITA M. CASTILLO-ROCHE
Juanita M. Castillo-Roche

Chrisophe [*sic*] W. Roche
/s/ CHRISTOPHE ROCHE

Copy to: Westfields Village Business Manager

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed Apr. 22, 2003]

PLAINTIFFS' MOTION TO REMAND PURSUANT TO 28 USC §1447(c)

Pursuant to 28 USC §1447(c), the Plaintiffs hereby motion the Court to remand the above captioned action back to the Fairfax County Circuit Court. In support of their Motion, plaintiffs respectfully refer the Court to the attached Memorandum in Support.

1. If at any time before a final judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded. 28 USC §1447(c). Pursuant to Order entered by The Honorable Gerald Bruce Lee on April 16, 2003, the Court directed that the Order did not constitute a "judgment" as defined in Federal [*sic*] Civil Procedure §54(a).

2. On September 17, 2002, defendants' Lincoln Property Co., Invesco Institutional, and SWIB Investment Company filed a Notice of Removal from the Fairfax County Circuit the above-referenced action with the Clerk of the United States District Court for the Eastern District of Virginia. The removal action was based on the

claim that the defendants were of diverse citizenship, and that none of the defendants were citizens or residents of the Commonwealth of Virginia, and that this Court had jurisdiction to hear the subject matter of this action pursuant to 28 USC §1332, and 1441(a).

This Court does not have subject matter jurisdiction because defendant Lincoln, is not a Texas Corporation, as alleged by defendant Lincoln, and as set forth in the attached Memorandum in Support, is not a Corporation at all, but rather a Partnership.

3. Defendants intentionally represented that "Lincoln Property Co." was a Texas Corporation with its principle [*sic*] place of business in Texas. In fact, defendant Lincoln Property Co., is not a Texas Corporation, but a Partnership with one of its partners residing in the Commonwealth of Virginia. The defendants' allegation that there was diversity of citizenship jurisdiction as the basis of their removal was a misrepresentation.

WHEREFORE, this action was never removable because it did not fall within the original diversity jurisdiction of this Court under 28 USC §1332 and 1441(a). The District Court lacks subject matter jurisdiction, and in accordance with 28 USC § 1332 and 1441(a). The District Court lacks subject matter jurisdiction, and in accordance with 28 USC §1447(c), "the case shall be remanded." Plaintiffs further request that in the Order remanding the case, that defendant Lincoln be required to make payment of just costs and all actual expenses, including attorney's fees, incurred as a result of the removal, all pursuant to 28 USC §1447(c). It is further respectfully requested that a certified copy of the Order of Remand be mailed to the Clerk of the Fairfax County Circuit Court, 4110 Chain Bridge Road, Fairfax, Virginia 22030, permitting that Court to thereupon proceed with this action. (In accordance with §1447(d), the entry of the Order remanding to the Fairfax County Circuit Court from which it was removed, is not reviewable on appeal or otherwise, as this

was not a case removed pursuant to §1443 of Title 28.) 28 USC §1447(d).

Because there is not complete diversity between the plaintiffs and the defendants, it is accordingly requested that the Court grant this Motion to Remand, dismissing this matter and voiding all Orders and Motions granting relief to defendants in this cause, for want of subject matter jurisdiction.

Respectfully submitted,

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703) 385-2745
Virginia State Bar No. 9211

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed Apr. 22, 2003]

MEMORANDUM IN SUPPORT OF MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION

I. SUMMARY OF RELIEF REQUESTED:

If at any time prior to final judgment it becomes clear that the removal court lacks subject matter jurisdiction, the removal court must remand the case to the state court from which the defendants originally removed the case. 28 USC §1447(c). If the Federal Court lacks subject matter jurisdiction, remand is mandatory and not reviewable on appeal. The Court strictly construes removal status because of federalism concerns. Where the need to remand is not self-evident, the Court must resolve any ambiguities concerning the propriety of removal in favor of remand.

For the reasons stated below, it is clear that there is a lack of subject matter jurisdiction because the numerous entities of Lincoln Property Co., including the one that is managing Westfield Village and accepting the management payments are not Texas Corporations. In actuality,

it is a partnership conducting business in the Commonwealth of Virginia. This partnership has a Virginia resident partner, and the defendants cannot meet the United States Supreme Court longstanding bright-line rule limiting corporate citizenship to corporations. Non-corporate entities are treated as partnerships, which carry the citizenship of their members. Furthermore, neither Lincoln Property Company nor Lincoln Property Co., are registered through the Virginia State Corporation Commission to transact business in this Commonwealth. (See Tab 2). In fact, the entity identified by defendants' counsel as EQR/Lincoln Limited Partnership (entity accepting management payments for Westfield Village) is registered through the Virginia SCC as a current partnership conducting business in this Commonwealth. (See Tab 3).

Courts uniformly hold that a relevant factor for imposing costs and expenses is whether the removing party contradicts well-settled law in attempting to remove the case to Federal Court. Where non-removability is contrary to well-settled law, the courts regularly impose costs and expenses as a result of the removal. [Please see the April 8, 2003, recently decided case of *Pauline Johnson-Brown, et al., v. 2200 M Street, LLC, et al.*, 2003 US Dist. LEXIS 5947, attached behind Tab 1.]

II. ARGUMENT:

The removal of civil cases to federal court infringes state sovereignty. Consequently, courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 US 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941). Assuming that the defendants establish the jurisdictional requirements of 28 USC §1441, the removal statute, by filing a Notice of Removal within 30 days after service of the initial pleading in the Fairfax County Circuit Court, "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 USC §1447(c). The Notice of Removal filed in the Fairfax County Circuit Court,

and attached hereto under Tab 4, alleged that the action was removable because it fell within the original diversity jurisdiction of this Court under 28 USC §1332 and 1441(a). At paragraph 5 of the Notice of Removal, defendants allege that Lincoln was not incorporated in the Commonwealth of Virginia, nor does it have a principle [*sic*] place of business in the Commonwealth of Virginia. "Rather, Lincoln is a Texas Corporation with its principle [*sic*] place of business in Texas." In fact, defendants knew that the Lincoln Property Co., entity accepting payment for managing Westfield Village known as EQR/Lincoln Limited Partnership was not even a Corporation authorized to do business as a corporation in the State of Virginia. It was in fact a partnership registered as such through the Virginia State Corporation Commission for such purposes. Supporting this fact are the following:

A. In the deposition of Fred E. Chaney, the 30(b)(6) organization designee for Lincoln Property Co., pursuant to Federal Rule of Civil Procedure, he testified that the organization was a partnership (See Tab 5 for deposition of Fred E. Chaney, taken on February 13, 2003). He testifies at page 4 that he is the property manager for Lincoln Property Co., and Senior Vice President. On the same page, he testifies that it is a partnership and it does not have a board. At page 18, he advises that he works for the partnership, and that other partnerships in Lincoln, on the commercial side of the company, manages assets for Invesco. When asked, at page 19, "is Lincoln owned or is it a subsidiary of a larger company?" He responds at P.19, "No." At page 21, he is questioned, "And is it not a publicly offered entity since it is a partnership, am I correct?" He answers, "Correct." At page 28, he advises that the company is in partnership and ownership with other partners that own assets that are also managed by Lincoln. On the same page, he advises that approximately 25 percent of the properties they manage are subject to partnership ownership. At pages 30 and 31 of his deposition, he testifies that Lincoln is in partnership ownership of two other apartment complexes in Virginia. (See Tab 5).

B. Deposition of John LeBeau, Vice President of the Mid-Atlantic Regional Division of Lincoln, taken on March 3, 2003, attached under Tab. 6. At pages 19-21, Mr. LeBeau identifies Jeff Franzen as a Senior Vice President, partner, in Lincoln Property Co.

C. Lincoln Property Co., Website, identifying at page 3, Jeff B. Franzen, Senior Vice President – Mid-Atlantic, the partner referred to by Mr. LeBeau in Lincoln Property Co. (See Tab 7).

D. Certificate of Virginia State Corporation Commission certifying that Lincoln Property Co., and Lincoln Property Company are not authorized nor registered as Foreign Corporations to conduct business in the Commonwealth of Virginia. The Certificate of the Virginia State Corporation Commission is also enclosed showing that EQR/Lincoln Limited Partnership is an authorized and registered partnership authorized to conduct business in the Commonwealth of Virginia. (Tabs 2 and 3). Furthermore, in the financial interest disclosure statement filed pursuant to Local Rule 7.1 of the Eastern District of Virginia to enable judges and magistrate judges to evaluate possible disqualification or recusal (See Tab 11) defendants' Lincoln certified through its counsel that there were no parents, trusts, subsidiaries, and/or affiliates of said party that had issues [*sic*] shares or debt securities to the public. This couldn't be further from the truth. It has been discovered through investigations of this matter and defendants' own admissions and testimony that Lincoln enjoys a partnership with Equity Residential (EQR). Lincoln and EQR have current partnerships on two Northern Virginia properties, and had a third partnership that has since been dissolved. (See Chaney's deposition, Tab 5, pages 28-31). Lincoln owns approximately 25 percent of these two current properties and acts as the property manager. (See Tab 8). These properties are The Reserve at Potomac Yard in Alexandria, Virginia, and The Reserve at Town Center in Potomac Falls, Virginia. The third property was known as The Reserve at Fairfax Corner, and Lincoln has since sold its interest to EQR in this

property. (See Tab 9). It is clear Lincoln formed a partnership as named above for these business transactions. Equity Residential, a known REIT (Real Estate Investment Trust), as evidenced by page 25 of Mr. Chaney's deposition (under Tab 5), is traded on the New York Stock Exchange as EQR. Surely, defendants and their counsel when filing the Rule 7.1 financial interest disclosure realized that this Trust, and Affiliate of Lincoln issued shares and/or debt securities to the public. (See Tab 10). Plaintiffs believe this and the other information contained in this filing clearly demonstrates a fraud on this Honorable Court.

E. Defendant Lincoln Property Co.'s initial disclosures pursuant to Rule 26(a)(1), at page 2 of its disclosure, Lincoln identifies Jeff B. Franzen as "Senior Vice President/Partner." (See Tab 12). Letter of Connie N. Bertram, dated March 18, 2003, disclosing the financial information concerning Lincoln Property Co., for purposes of showing financial worth for punitive damage assessment in which defendants' counsel advises that "EQR/Lincoln Limited Partnership, is the entity that receives the management fees for Westfield Village Apartments." (See Tab 13). This along with Senior Vice President Chaney and Regional Vice President LeBeau's testimony demonstrates that the Lincoln entity subject to the plaintiffs' filing of their Complaint is in fact partnership, not a corporation.

F. Fairfax County Tax Assessment Office records and Fairfax County Deed, Deed of Trust, records showing that Senior Vice President/Partner, Jeff B. Franzen, is a resident of Fairfax County, Virginia. (Tab 14).

G. Letter of February 20, 2003, with attached signed affirmation of Jeff B. Franzen, where he certifies and affirms under penalty of perjury, that he is the "Senior Vice President/Partner for defendant Lincoln Property Co. ("Lincoln") and that I am authorized to act for Lincoln . . . ." (See Tab 15).

[Part III omitted]

Respectfully submitted,

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703)-385-2745
Virginia State Bar No. 9211

[certificate of service omitted]

Commonwealth of Virginia

State Corporation Commission

234

I Certify the Following from the Records of the Commission:

LINCOLN PROPERTY CO. is not the name of any corporation existing under the laws of Virginia or of a corporation holding a certificate of authority to transact business in Virginia.

Nothing more is hereby certified.

Signed and Sealed at Richmond on this Date:
April 21, 2003

Joel H. Peck

Joel H. Peck, Clerk of the Commission

CIS0502

Commonwealth of Virginia

State Corporation Commission

I Certify the Following from the Records of the Commission:

235

Lincoln Property Company is not the name of any corporation existing under the laws of Virginia or of a corporation holding a certificate of authority to transact business in Virginia.

Nothing more is hereby certified.

Signed and Sealed at Richmond on this Date:
April 21, 2003

Joel H. Peck

Joel H. Peck, Clerk of the Commission

CIS0316

VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
Including professional corporations

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MARYLAND
VIRGINIA

VENABLE
ATTORNEYS AT LAW

Connie N. Bertram
(202) 962-4855
cnbertram@venable.com

March 18, 2003

VIA FACSIMILE AND REGULAR MAIL

236

Jerry M. Phillips
Phillips, Hall, Beckwith & Chase
10513 Judicial Drive, Suite 100
Fairfax, VA 22030

Re: Christophe Roche, et al. v. Lincoln Property Co., et al.,
United States District Court for the Eastern District of Virginia,
Civil Action No. 02-1390-A (JBL)

Dear Jerry:

I am writing in response to your March 13, 2003 letter requesting information concerning Lincoln's financial statements. Lincoln is willing to enter into a stipulation regarding the following financial information concerning EQR/Lincoln Limited Partnership, the entity that receives the management fees for Westfield Village Apartments:

	2001 (audited)	2002 (unaudited)
Net worth/book value	$7,759,939	$8,655,790
Revenue from Management Fees	$19,884,710	$17,353,301
Other Revenue	$17,258,929	$ 7,535,277
Total Revenue	$37,143,639	$24,888,578

I believe that this proposed stipulation addresses each of the categories of information requested in your March 13, 2003 letter. If this proposal is acceptable, I will amend the parties' proposed pre-trial stipulations to include this information.

Thank you for your assistance with this matter.

Sincerely,

Connie Bertram /NSC

Connie N. Bertram

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Apr. 30, 2003]

OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

[text, signature block, and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Apr. 29, 2003]

DECLARATION OF DAN M. JACKS

Dan M. Jacks, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I am the General Counsel and Vice President of Lincoln Property Company ("Lincoln"). Furthermore, I am the General Counsel, Vice President and Assistant Secretary for Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc.

3. Lincoln is located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas, 75201. Lincoln is a Texas corporation with its principal place of business located in Dallas, Texas. I have attached hereto true and accurate copies of Lincoln's certificate of existence and Articles of Incorporation. See Ex. A.

4. On November 13, 1997, EQR/Lincoln Limited Partnership was formed pursuant to the Delaware Revised Uniform Limited Partnership Act, 6 Delaware Code,

Chapter 17. I have attached hereto a true and accurate copy of EQR/Lincoln Limited Partnership's Certificate of Limited Partnership and relevant portions of the EQR/Lincoln Limited Partnership agreement. See Ex. B.

5. The partners of EQR/Lincoln Limited Partnership are Lincoln Eastern Management Corporation, a Texas corporation with its principal place of business in Dallas, Texas, and Lincoln Placeholder Limited Partnership, which is a Texas Partnership. I have attached hereto true and accurate copies of Lincoln Eastern Management Corporation's certificate of existence and Articles of Incorporation, see Ex. C, and Lincoln Placeholder Limited Partnership's Certificate of Limited Partnership and relevant portions of its partnership agreement. See Ex. D.

6. Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., which is a Texas corporation with its principal place of business in Dallas, Texas. I have attached hereto a true and accurate copy of Lincoln E.C.W. Property Management, Inc.'s certificate of existence and Articles of Incorporation. See Ex. E.

7. Lincoln Eastern Management Corporation and EQR/Lincoln Limited Partnership are successors in interest to the apartment management business that was conducted by Lincoln and certain other affiliates until 1991. Lincoln, however, allows Lincoln Eastern Management Corporation and EQR/Lincoln Limited Partnership to use its tradename and trademark.

8. Jeff B. Franzen is not a partner in EQR/Lincoln Limited Partnership. Rather, Franzen is Vice President of Lincoln Eastern Management Corporation. Franzen is referred to as a "partner" at Lincoln because he is a partner in several Texas limited partnerships that own residential properties. However, Franzen is not a partner of any entity that managed and/or collected fees pursuant to a management agreement for Westfield Village.

9. Westfield Village is an apartment complex in Centreville, Virginia that is owned by Defendant SWIB. EQR/Lincoln Limited Partnership receives management fees from SWIB for managing Westfield Village apartments.

I hereby declare under penalty of perjury that the foregoing information is true and correct.

April 29, 2003
Date

/s/ DAN M. JACKS
Dan M. Jacks

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the document, Articles of Incorporation for LINCOLN PROPERTY COMPANY (filing number: 48121700), a Domestic Business Corporation, was filed in this office on June 28, 1979.

241

It is further certified that the entity status in Texas is active.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

242

LINCOLN PROPERTY COMPANY
Filing Number: 48121700

Articles of Incorporation	June 28, 1979
Articles of Amendment	December 16, 1980
Change Of Registered Agent/Office	January 06, 1985
Change Of Registered Agent/Office	July 13, 1990

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

THE STATE OF TEXAS

Gwyn Shea

Gwyn Shea
Secretary of State

ARTICLES OF INCORPORATION

OF

LINCOLN PROPERTY COMPANY NO. 1, INC.

FILED
In the Office of the
Secretary of State of Texas
JUN 28 1979

The undersigned natural person of the age of eighteen years or more, acting as incorporator of the corporation under the Texas Business Corporation Act, does hereby adopt the following Articles of Incorporation for such corporation:

ARTICLE ONE

The name of the corporation is LINCOLN PROPERTY COMPANY NO. 1, INC.

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purpose or purposes for which the corporation is organized is to engage in the transaction of any or all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have authority to issue is ten thousand (10,000) shares of $ 1.00 par value common stock. Such shares shall not have cumulative voting rights, and no shareholder shall have any preemptive rights to subscribe for or acquire unissued or treasury shares of the corporation.

ARTICLE FIVE

The corporation will not commence business until it has received for issuance of its shares consideration of the value of One Thousand Dollars ($ 1,000.00), consisting of money, labor done or property actually received, which sum is not less than One Thousand Dollars ($ 1,000.00).

ARTICLE SIX

The street address of its initial registered office is Republic National Bank Building, c/o C T Corporation System, Dallas, Texas 75201, and the name of its initial registered agent at such address is C T CORPORATION SYSTEM.

ARTICLE SEVEN

The number of directors of the corporation may be fixed by the by-laws. The directors, constituting the initial board of directors who are to serve as directors until the first annual meeting of the shareholders or until successors are elected and qualified are:

NAME	ADDRESS
Mack Pogue	1900 Two Turtle Creek Village Dallas, TX 75219
Wm. M. Bannister	1900 Two Turtle Creek Village Dallas, TX 75219

ARTICLE EIGHT

The name and address of the incorporator is:

NAME	ADDRESS
Delanie D. Montfort	206 West 13th, Suite A Austin, TX 78701

IN WITNESS WHEREOF, I have hereunto set my hand, this 29th day of June, 1979.

Delanie D. Montfort
Delanie D. Montfort

Sworn to June 28, 1979.

Cheryl M Roberts
Notary Public for Travis County, TX

CHERYL M ROBERTS
Notary Public in and for Travis County, Texas
My Commission Expires October 4, 1980

FILED
DEC 16 1980
CLERK RJ
Corporation Division

ARTICLES OF AMENDMENT

TO THE

ARTICLES OF INCORPORATION

OF

LINCOLN PROPERTY COMPANY NO 1., INC.

--ooOoo--

Pursuant to the provisions of Art. 4.04 of the Texas Business Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

ARTICLE ONE. The name of the corporation is

LINCOLN PROPERTY COMPANY NO 1., INC.

ARTICLE TWO. The following amendment to the Articles of Incorporation was adopted by the shareholders of the corporation on December 9, 1980:

Article One of the Articles of Incorporation is hereby amended so as to read as follows:

"One. The name of the corporation is
LINCOLN PROPERTY COMPANY"

ARTICLE THREE. The number of shares of the corporation outstanding at the time of such adoption was one thousand (1,000); and the number of shares entitled to vote thereon was one thousand (1,000).

ARTICLE FOUR. The holder of all of the shares outstanding and entitled to vote on said amendment has signed a consent in writing adopting said amendment.

Dated December 13, 1980.

LINCOLN PROPERTY COMPANY NO 1., INC.

By _____
Vice-President

And _____
Secretary

245

STATE OF TEXAS.

COUNTY OF DALLAS.

I, ELLEN T. NOYES , a Notary Public, do hereby certify that on this 12th day of December, 1980, personally appeared before me E. E. MOORE , who declared he is VICE PRESIDENT of the corporation executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public for Dallas County, Texas

(NOTARIAL SEAL)

My Commission Expires: 12/28/80

246

Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EQR/LINCOLN LIMITED PARTNERSHIP" IS DULY FORMED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FOURTH DAY OF APRIL, A.D. 2003.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL TAXES HAVE BEEN PAID TO DATE.

247

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

2821007 8300

030266436

AUTHENTICATION: 2381415

DATE: 04-24-03

Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF "EQR/LINCOLN LIMITED PARTNERSHIP" AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

CERTIFICATE OF LIMITED PARTNERSHIP, FILED THE THIRTEENTH DAY OF NOVEMBER, A.D. 1997, AT 4:30 O'CLOCK P.M.

CERTIFICATE OF CORRECTION, FILED THE NINETEENTH DAY OF NOVEMBER, A.D. 1997, AT 3 O'CLOCK P.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID LIMITED PARTNERSHIP.

248

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

2821007 8100H

030266436

AUTHENTICATION: 2381414

DATE: 04-24-03

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 04:30 PM 11/13/1997
971388571 - 2821007

CERTIFICATE OF LIMITED PARTNERSHIP
OF
EQR/LINCOLN LIMITED PARTNERSHIP

The undersigned, desiring to form a limited partnership pursuant to the Delaware Revised Uniform Limited Partnership Act, 6 Delaware Code, Chapter 17, do hereby certify as follows:

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I. The name of the limited partnership is EQR/Lincoln Limited Partnership.

II. The address of the Partnership's registered office in the State of Delaware is Corporation Trust Center, 1209 Orange Street, Wilmington, County of New Castle. The name of the Partnership's registered agent for service of process in the State of Delaware at such address is The Corporation Trust Company.

III. The name and mailing address of each general partner is as follows:

Lincoln Eastern Management Corporation
P. O. Box 1920 1505 Federal Street
Dallas, Texas 75221-1920 Dallas, Texas 75201

Lincoln Placeholder Limited Partnership
P. O. Box 1920 1505 Federal Street
Dallas, Texas 75221-1920 Dallas, Texas 75201

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Limited Partnership of EQR/Lincoln Limited Partnership, as of November 13th, 1997.

GENERAL PARTNERS:

Lincoln Eastern Management Corporation
a Texas corporation

Dan Jacks, Vice President

Lincoln Placeholder Limited Partnership
a Texas limited partnership

By: Lincoln Eastern Management Corporation
a Texas corporation, its general partner

Dan Jacks, Vice President

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 03:00 PM 11/19/1997
971395197 - 2821007

CERTIFICATE OF CORRECTION FILED TO CORRECT A CERTAIN ERROR IN THE CERTIFICATE OF LIMITED PARTNERSHIP OF EQR/LINCOLN LIMETED PARTNERSHIP FILED IN THE OFFICE OF THE SECRETARY OF STATE OF DELAWARE ON NOVEMBER 13, 1997.

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EQR/Lincoln Limited Partnership, a limited partnership organized and existing under and by virtue of the Delaware Limited Partnership Act

DOES HEREBY CERTIFY:

1. The name of the limited partnership is EQR/Lincoln Limited Partnership.

2. That a Certificate of Limited Partnership was filed by the Secretary of State of Delaware on November 13, 1997 and that said Certificate required correction as permitted by Section 17.213 of the Delaware Limited Partnership Act of the State of Delaware.

3. The inaccuracy or defect of said Certificate to be corrected is as follows: listing of Lincoln Eastern Management Corporation, a Texas corporation and Lincoln Placeholder Limited Partnership, a Texas partnership, as General Partners.

4. The execution, sealing or acknowledgment of the Certificate is corrected as follows: the sole General Partner is

Lincoln Eastern Management Corporation, a Texas corporation
P. O. Box 1920 — 1506 Federal Street
Dallas, Texas 75221-1920 — Dallas, Texas 75201

IN WITNESS WHEREOF, said EQR/Lincoln Limited Partnership has caused this Certificate to be signed by Lincoln Eastern Management Corporation, its General Partner, this 19th day of November, 1997.

GENERAL PARTNER:

Lincoln Eastern Management Corporation, a Texas corporation

By _____
Dan Jacka, Vice President

LIMITED PARTNERSHIP AGREEMENT

OF

EQR/LINCOLN LIMITED PARTNERSHIP

THE PARTNERSHIP INTERESTS REFERRED TO HEREIN HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY OTHER SECURITIES LAWS

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THIS LIMITED PARTNERSHIP AGREEMENT (this "Agreement") of EQR/LINCOLN LIMITED PARTNERSHIP (the "Partnership") is hereby made and adopted effective as of November 13, 1997, by and among LINCOLN EASTERN MANAGEMENT CORPORATION, a Texas corporation (in its capacity as a general partner of the Partnership, "Eastern GP", and in its capacity as a limited partner, "Eastern LP"), and LINCOLN PLACEHOLDER LIMITED PARTNERSHIP, a Texas limited partnership (the "Lincoln Placeholder"). Eastern GP and Eastern LP are herein sometimes collectively and individually referred to as "Eastern".

RECITALS

A. Eastern and the Lincoln Placeholder desire for the Partnership to be operated for the purposes of providing services (as more particularly defined below, the "Services") relating to multi-family residential real estate projects (as more particularly defined below, "Projects"). Such Services may include but are not limited to the acquisition, development, construction, management and disposition of Projects and the negotiation and administration of various financing arrangements or funds relating to Projects, among other activities.

B. A Certificate of Limited Partnership for the Partnership was filed on November 13, 1997, in the Office of the Secretary of State of the State of Delaware. This Agreement is entered into pursuant to that certain Formation Agreement (the "Formation Agreement") dated as of November 19, 1997, executed by Eastern and ERP Operating Limited Partnership ("ERP") or their respective Affiliates.

C. As described in the Formation Agreement, Eastern and the Lincoln Placeholder desire each to own fifty percent (50%) of the Partnership, with Eastern or one or more of its Affiliates contributing to the Partnership certain Service & Development Contracts, as defined below, together with Eastern's expertise and capability, among other things, with respect to the business of providing Services to Projects. The parties further desire to grant to ERP or one or more of its Affiliates (as defined below) a fifty percent (50%) interest in the net profits of the Partnership, as more particularly provided in that certain Profit Participation Agreement dated effective as of January 1, 1998, to be entered into between the Partnership and ERP or its Affiliate

shall be deemed to refer to the masculine, feminine or neuter, singular or plural, as the identity of the person or entity may require. Unless the context requires otherwise, all references in this Agreement to Sections or Articles shall be deemed to mean and refer to Sections and Articles in this Agreement. The Partners hereby waive any right that they may have to cause a partition of Partnership assets. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. Furthermore, in lieu of each such illegal, invalid or unenforceable provision, there shall be substituted a provision as similar in effect to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and said counterparts shall constitute but one and the same agreement which may be sufficiently evidenced by one counterpart.

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IN WITNESS WHEREOF, the undersigned, being all of the Partners of the Partnership, have caused this Agreement to be duly adopted by the Partnership effective as of November 13, 1997.

GENERAL PARTNER:

LINCOLN EASTERN MANAGEMENT CORPORATION,
a Texas corporation

By: _____
A. Mack Pogue
Chairman of the Board

LIMITED PARTNERS:

LINCOLN EASTERN MANAGEMENT CORPORATION,
a Texas corporation

By: _____
J. Timothy Byrne
President

[SIGNATURES CONTINUED ON NEXT PAGE]

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP,
a Texas limited partnership

By: Lincoln Eastern Management Corporation,
a Texas corporation

By: _____
Name: _____
Its: _____
TIM BYRNE
PRESIDENT

253

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the document, Articles Of Incorporation for LINCOLN EASTERN MANAGEMENT CORPORATION (filing number: 121374000), a Domestic Business Corporation, was filed in this office on December 06, 1991.

254

It is further certified that the entity status in Texas is active.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

255

LINCOLN EASTERN MANAGEMENT CORPORATION
Filing Number: 121374000

Articles Of Incorporation	December 06, 1991
Public Information Report (PIR)	December 31, 2000
Public Information Report (PIR)	December 31, 2002

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

FILED
In the Office of the
Secretary of State of Texas
DEC 06 1991
Corporations Section

ARTICLES OF INCORPORATION

OF

LINCOLN EASTERN MANAGEMENT CORPORATION

---oOo---

We, the undersigned natural persons of the age of eighteen years or more, acting as incorporators of a corporation under the Texas Business Corporation Act, do hereby adopt the following Articles of Incorporation for such corporation:

ARTICLE ONE

The name of the corporation is

LINCOLN EASTERN MANAGEMENT CORPORATION

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purpose or purposes for which the corporation is organized are:

To engage in the transaction of any or all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have authority to issue is Ten Thousand (10,000) common shares of the par value of One Dollar ($1.00) each (or without par value).

Cumulative voting rights are denied to all shareholders.

Preemptive rights to acquire additional shares of the corporation are denied to all shareholders.

ARTICLE FIVE

The corporation will not commence business until

it has received for the issuance of its shares consideration of the value of One Thousand Dollars ($1,000.00), consisting of money, labor done or property received.

ARTICLE SIX

The street address of its initial registered office is 350 N. St. Paul Street, c/o C T CORPORATION SYSTEM, Dallas, Texas 75201, and the name of its initial registered agent at such address is

C T CORPORATION SYSTEM

ARTICLE SEVEN

The number of directors of the corporation may be fixed by the By-Laws.

The number of directors constituting the initial Board of Directors is two (2), and the name and address of each person who is to serve as director until the first annual meeting of the shareholders or until a successor is elected and qualified are:

NAME	ADDRESS
Mack Fogus	1505 Federal Street Dallas, Texas 75201
Timothy Byrne	1505 Federal Street Dallas, Texas 75201

ARTICLE EIGHT

The names and addresses of the incorporators are:

NAME	ADDRESS
M. S. Green	350 N. St. Paul Street Dallas, TX 75201
J. P. Goins	350 N. St. Paul Street Dallas, TX 75201

IN WITNESS WHEREOF, we have hereunto set our hands, this 5th day of December, 1991.

M. S. Green

J. F. Goins

STATE OF Texas

COUNTY OF Dallas

I, Joann K. Washington, a Notary Public do hereby certify that on this 5th day of December, 1991, personally appeared before me, M. S. Green and J. F. Goins, who each being by me first duly sworn, severally declared that they are the persons who signed the foregoing document as incorporators, and that the statements therein contained are true.

Joann K. Washington
Notary Public

(NOTARIAL SEAL)

JOANN K. WASHINGTON
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires 1-27-92

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the document, Certificate Of Limited Partnership for LINCOLN PLACEHOLDER LIMITED PARTNERSHIP (filing number: 10285210), a Domestic Limited Partnership (LP), was filed in this office on November 14, 1997.

259

It is further certified that the entity status in Texas is active.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

260

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP
Filing Number: 10285210

Certificate Of Limited Partnership — November 14, 1997

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Come visit us on the internet at http://www.sos.state.tx.us/
PHONE(512) 463-5555 FAX(512) 463-5709 TTY7-1-1
Prepared by: Debbie Melvin

CERTIFICATE OF LIMITED PARTNERSHIP

FOR

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP

FILED
In the Office of the
Secretary of State of Texas
NOV 14 1997
Corporation

The undersigned, being all of the General Partners of a limited partnership to be formed pursuant to the requirements of the Texas Revised Limited Partnership Act, Article 6132a of the Revised Civil Statutes of the State of Texas, hereby certify as follows:

1. Name. The name of the Partnership is LINCOLN PLACEHOLDER LIMITED PARTNERSHIP.

2. Principal Office. The address of the principal office in the United Sates of the partnership is:

3300 Lincoln Plaza
500 North Akard
Dallas, Texas 75201.

3. Registered Office and Registered Agent. The name and address of the registered agent for service of process is:

Nancy Davis
3300 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

4. Names/Addresses of General Partners. The names, mailing and business street addresses of the general partners are:

Lincoln Eastern Management Corporation
P. O. Box 1920 — Dallas, Texas 75221-1920
1505 Federal Street — Dallas, Texas 75201

IN WITNESS WHEREOF, the undersigned have executed this Certificate this 13th day of November, 1997.

Lincoln Eastern Management Corporation
a Texas corporation, a general partner

By: _____
Dan Jacob, Vice President

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GRANTOR INDEX

AGREEMENT

OF LIMITED PARTNERSHIP

OF

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP

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This Agreement of Limited Partnership ("Agreement") is made and entered into as of the 1st day of November, 1997 by, between and among the entity signing below as Managing General Partner ("Managing General Partner") (the Managing General Partner is sometimes hereinafter referred to as a "General Partner," which term as used herein shall also apply to any persons or entities, if any hereafter admitted to the Partnership as a general partner), and the persons or entities signing below as Limited Partners (each of the foregoing being sometimes hereinafter referred to individually as a "Limited Partner" and collectively as the "Limited Partners"). The General Partner and the Limited Partners are sometimes hereinafter referred to individually as a "Partner" and collectively as the "Partners".

1. Formation and Name. The Partners hereby form a limited partnership under the name of Lincoln Placeholder Limited Partnership (the "Partnership") pursuant to the provisions of the Revised Limited Partnership Act of Texas (the "Act"). The "Managing General Partner," as defined in Section 9.1. below, may at any time change the name of the Partnership or adopt such trade or fictitious names as it may determine.

2. Capital.

2.1. Original Capital. The original capital of the Partnership shall consist of $100 cash, which shall be contributed by the Partners in the percentages set forth opposite their signatures hereto, subject however to the provisions of Section 2.3. (a) below. No Partner has contributed property other than cash to the Partnership. Each Partner, whether a General Partner or a Limited Partner, shall have an interest in the Partnership which shall be expressed in terms of a percentage of the whole, with the present Percentage Interests as defined in Section 6.1. being set forth opposite their signatures hereto.

2.2. Additional Funds.

(a) Except as provided in Section 2.2. (b) below, any additional funds required by the Partnership to meet its cash requirements shall be borrowed by the Partnership from third parties upon such terms and conditions as the Managing General Partner, in its discretion, deems necessary or appropriate; provided, however, that in lieu of causing the Partnership to borrow from third parties, any one or more of the Partners, with the approval of the Managing General Partner, may from time to time make advances to the Partnership to meet such cash requirements, which such advances shall be repaid on demand on a fully recourse basis and shall bear simple interest at a rate equal to the lesser of (i) one percent (1%) per annum in

or if acquired in any other name, the agent or nominee shall place a written declaration of beneficial interest in the Partnership's books and records that acknowledges the capacity in which the agent or nominee acts and that the Partnership is the true or equitable owner. Such declaration of beneficial interest may be in form suitable for recording and may provide that if such agent or nominee shall die, become incapacitated, make an assignment for the benefit of creditors, be adjudicated as bankrupt or insolvent, then, in any such event, the Managing General Partner shall, as said agent's or nominee's irrevocable agent and attorney-in-fact, execute any legal instrument necessary to properly reflect the Partnership's interest.

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5. Term. The term of the Partnership shall continue until terminated or dissolved pursuant to the terms of Section 17.1. hereof.

6. Allocations.

6.1. Certain Definitions. For purpose of this Agreement, the following capitalized terms shall have the meanings set forth below:

"Adjusted Capital Account" means, with respect to a Partner, the balance in such Partner's Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments: (i) increase such Capital Account by any amounts which the Partner is obligated to restore or is treated as being obligated to restore pursuant to Section 1.704-1(b)(2)(ii)(c) of the Treasury Regulations; (ii) increase such Capital Account by an amount which the Partner is deemed to be obligated to restore represented by such Partner's share of Partnership minimum gain pursuant to Treasury Regulation Section 1.704.2(g)(1); (iii) decrease such Capital Account by the items described in Treasury Regulation Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iv) increase such Capital Account by an amount which the Partner is deemed to be obligated to restore represented by such Partner's share of partner minimum gain pursuant to Treasury Regulation Section 1.704-2(i). This definition shall be interpreted consistently with Treasury Regulation Section 1.704-1(b)(2)(ii)(d).

"Contributing Partner" means the following Partners: Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc.

"Contribution Interest," as to a Contributing Partner, means the following percentages:

Lincoln Eastern Management Corporation	99.5000%
Lincoln E.C.W. Property Management, Inc.	0.5000%
	100.0000%

"Net Income" and "Net Loss" means, for each Fiscal Year or other period, (i) the excess of the Income for such period over the Loss for such period, or (ii) the excess of the Loss for such period over the Income for such period, respectively; provided, however, Net Income and Net Loss for a Fiscal Year shall be computed by excluding from such computation any Income and Loss specially allocated under Section 6.3. (including, but not limited to,

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written by the following Partners, whose respective residence addresses and percentage interests are set forth opposite their respective signatures.

MANAGING GENERAL PARTNER:

Residence Address		Percentage Interest:
3300 Lincoln Plaza 500 N. Akard Dallas, TX 75201	Lincoln Eastern Management Corporation By: _____ Name: DAN M. JACKS Title: Vice President	99.5000%

LIMITED PARTNER:

3300 Lincoln Plaza 500 N. Akard Dallas, TX 75201	Lincoln H.C.W. Property Management, Inc. By: _____ Name: DAN M. JACKS Title: Vice President	0.5000%

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The State of Texas

SECRETARY OF STATE
CERTIFICATE OF INCORPORATION

OF

LINCOLN E.C.W. MANAGEMENT, INC.
CHARTER NO. 1166949

The undersigned, as Secretary of State of Texas, hereby certifies that Articles of Incorporation for the above corporation duly signed pursuant to the provisions of the Texas Business Corporation Act, have been received in this Office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in the Secretary by law, hereby issues this Certificate of Incorporation and attaches hereto a copy of the Articles of Incorporation.

Issuance of this Certificate of Incorporation does not authorize the use of a corporate name in this State in violation of the rights of another under the federal Trademark Act of 1946, the Texas trademark law, the Assumed Business or Professional Name Act, or the common law.

Dated SEPTEMBER 20 ,19 90.

THE STATE OF TEXAS

George S Bayoud Jr.
Secretary of State

dae

FILED
In the Office of the
Secretary of State of Texas

SEP 20 1990

Corporations Section

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ARTICLES OF INCORPORATION

OF

Lincoln E.C.W. Management, Inc.

---oOo---

We, the undersigned natural persons of the age of eighteen years or more, acting as incorporators of a corporation under the Texas Business Corporation Act, do hereby adopt the following Articles of Incorporation for such corporation:

ARTICLE ONE

The name of the corporation is

Lincoln E.C.W. Management, Inc.

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purpose or purposes for which the corporation is organized are:

To engage in the transaction of any or all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have authority to issue is Ten Thousand (10,000) of the par value of One Dollar ($1.00) each.

ARTICLE FIVE

The corporation will not commence business until it has received for the issuance of its shares consideration of the value of One Thousand Dollars ($1,000.00), consisting of money, labor done or property received.

ARTICLE SIX

The street address of its initial registered office is 350 N. St. Paul Street, c/o C T CORPORATION

SYSTEM, Dallas, Texas 75201, and the name of its initial registered agent at such address is

C T CORPORATION SYSTEM

ARTICLE SEVEN

The number of directors of the corporation may be fixed by the By-Laws.

The number of directors constituting the initial Board of Directors is Two (2), and the name and address of each person who is to serve as director until the first annual meeting of the shareholders or until a successor is elected and qualified are:

NAME	ADDRESS
Mack Pogue	1303 Federal Street Dallas, Texas 75201
Timothy Byrne	1303 Federal Street Dallas, Texas 75201

ARTICLE EIGHT

The names and addresses of the incorporators are:

NAME	ADDRESS
L. B. LeBaron	350 N. St. Paul Street Dallas, TX 75201
D. C. Sweeney	350 N. St. Paul Street Dallas, TX 75201

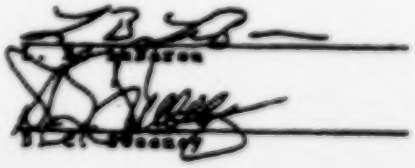
ARTICLE NINE

The shareholders of the corporation are expressly denied the right of cumulative voting.

ARTICLE TEN

The preemptive rights of the shareholders of the corporation are expressly denied.

IN WITNESS WHEREOF, we have hereunto set our hands, this Nineteenth day of September, 1990.



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STATE OF TEXAS

COUNTY OF DALLAS

I, Joann H. Washington, a Notary Public do hereby certify that on this Nineteenth day of September, 1990, personally appeared before me, L. B. LeBaron and B. C. Sweeney, who each being by me first duly sworn, severally declared that they are the persons who signed the foregoing document as incorporators, and that the statements therein contained are true.

Notary Public

(NOTARIAL SEAL)

JOANN H. WASHINGTON
Notary Public
STATE OF TEXAS
My Commission Expires 1-27-94

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The State of Texas

SECRETARY OF STATE

CERTIFICATE OF AMENDMENT
OF

LINCOLN E.C.W. PROPERTY MANAGEMENT, INC.
FORMERLY:
LINCOLN E.C.W. MANAGEMENT, INC.

The undersigned, as Secretary of State of the State of Texas, hereby certifies that the attached Articles of Amendment, duly signed, have been received in this Office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in the Secretary by law, issues this Certificate and attaches hereto a copy.

Dated October 5 19 90

THE STATE OF TEXAS

George S Bayoud Jr.
Secretary of State

FILED
In the Office of the
Secretary of State of Texas

OCT 5 1990

Corporations Section

ARTICLES OF AMENDMENT

TO THE

ARTICLES OF INCORPORATION

OF

LINCOLN E.C.W. MANAGEMENT, INC.

270

Pursuant to the provisions of Art. 4.04 of the Texas Business Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

ARTICLE ONE: The name of the corporation is LINCOLN E.C.W. MANAGEMENT, INC.

ARTICLE TWO: The following amendment to the Articles of Incorporation was adopted by the shareholders of the corporation on October 2, 1990:

> Article One of the Articles of Incorporation is hereby amended so as to read as follows: The name of the corporation is LINCOLN E.C.W. PROPERTY MANAGEMENT, INC.

ARTICLE THREE: The number of shares of the corporation outstanding at the time of such adoption was One Thousand (1,000); and the number of shares entitled to vote thereon was One Thousand (1,000).

ARTICLE FOUR: The holders of all of the shares outstanding and entitled to vote on said amendment have signed a consent in writing adopting said amendment.

Dated October 4, 1990

LINCOLN E.C.W. MANAGEMENT, INC.

John W. Pritchett, Vice President

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant.

February 13, 2003

DEPOSITION OF:

FRED E. CHANEY

was called for examination by Counsel for the Plaintiff, pursuant to Notice, taken at the law offices of Jerry M. Phillips, Esquire, Phillips, Beckwith, Hall & Chase, 10513 Judicial Drive, Suite 100, Fairfax, Virginia 22030, commencing at 1:10 p.m., on the 13th day of February, 2003, before Mary Silverthorne, a Notary Public in and for the State of Virginia, at Large, when were present on behalf of the respective parties:

* * * * *

[4] PROCEEDINGS

Thereupon,

FRED E. CHANEY

the witness, called for examination by Counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF
BY MR. PHILLIPS:

Q Would you please state your name and address?

A Fred Chaney, 4028 Centenary – that's C-e-n-t-e-n-a-r-y – Dallas, Texas.

Q And would you please tell us what your occupation is and your position?

A I am property manager for Lincoln Property Company and Senior Vice President.

Q And do you sit on the board of Lincoln Property?

A We're a partnership. I am a partner in new deals. We don't have a board.

Q And this is a limited liability corporation or company?

A We have multiple structures that we [5] operate under.

Q And where is the corporate headquarters?

A Dallas, Texas.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY COMPANY, ET AL.,
Defendants.

Monday, March 3, 2003
Vienna, Virginia

Deposition of:

JOHN LeBEAU

a witness, called for examination by counsel on behalf of the Plaintiffs, pursuant to notice, taken in the law offices of Venable, Baetjer, Howard & Civiletti, 8002 Towers Crescent Drive, Vienna, Virginia, beginning at approximately 2:20 o'clock p.m., before William L. Finley, Verbatim Reporter and Notary Public in and for the Commonwealth of Virginia, when there were present on behalf of the respective parties:

* * * * *

[20]

* * * * *

[BY MR PHILLIPS:]

Q Is there anyone higher ranking than you at this regional office, as far as supervisory or management authority?

MS. BERTRAM: Objection; vague.

BY MR. PHILLIPS:

Q In other words, who is the highest ranking officer at that office?

MS. BERTRAM: Same objection.

BY MR. PHILLIPS:

Q Today, I mean. Right now.

A Jeff Franzen.

Q Jeff –

A Franzen.

Q And does he work out of the Herndon office?

A Yes.

Q And how long has he been there?

A I don't know.

Q Has he been there since you started in 1999?

A Yes.

Q And that's F-r-a-n-z-e-n?

[21]

A Yes.

Q And what's his title?

A Senior Vice President, Partner.

Q He is a partner in Lincoln Property Company; correct?

MS. BERTRAM: Objection to the extent it calls for speculation.

BY MR. PHILLIPS:

Q Is that correct?

A I don't know what he is a partner of.

Q Well, you report to him?

A Somewhat.

Q Who is your direct report?

A Fred Cheney.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Apr. 29, 2003]

DECLARATION OF JEFF FRANZEN

Jeff Franzen, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I am a Vice President for Lincoln Eastern Management Corporation. In addition, I am referred to as a "Partner" because I am a partner in several Texas limited partnerships that are involved in the acquisition and development of properties.

3. However, I have never been a partner in EQR/Lincoln Limited Partnership. In addition, I am not a partner in any entity that is responsible for managing or that receives management fees for Westfield Village apartments.

I declare under penalty of perjury that the information in this Declaration is true and correct.

4/29/03
Date

/s/ JEFF FRANZEN
Jeff Franzen

[Attachments To May 11, 2003 Pleading – Excerpt]

[from website:
http://www.lincolnapts.com/AboutLPC/CorporateLeaders.cfm
(dated 5/12/03)]

Lincoln Property Company

Corporate *Leaders*

About LPC

Corporate Leaders

Regional Offices

Clients

- **Mack Pogue**, Chairman
- **Tim Byrne**, President
- **Brian Byrne**, Senior Vice President – Western Midwest
- **Jeffry T. Courtwright**, Senior Vice President – Southwest
- **Reggie D. Delponte**, Senior Vice President – California
- **Jeff B. Franzen**, Senior Vice President – Mid Atlantic
- **Kevin Keane**, Senior Vice President – Eastern Midwest
- **Charles O. Shallat**, Senior Vice President – Southeast
- **Anthony V. Ianuale Jr.**, Vice President – Northeast
- **John Noone**, Vice President
- **David C. Martin**, Vice President Acquisitions – Southwest
- **Dennis Streit**, Chief Financial Officer
- **Fred E. Chaney**, Senior Vice President – Property Management
- **Billy J. Grant, Jr.**, Senior Vice President – Construction
- **Dan M. Jacks**, Senior Vice President/General Counsel
- **Brian K. Austin**, Vice President – Finance & Analysis
- **Maria Lawson**, Vice President – Marketing and Training

Mack Pogue, Chairman

Mack Pogue, Chairman and Chief Executive Officer of Lincoln Property Company, formed the company in 1965 to develop, own and manage top caliber real estate properties. Since that time, Mr. Pogue has developed more

than $17 billion in residential, commercial, and retail properties throughout the United States and Europe. Mr. Pogue remains an active and integral part of the decision making process for each development and personally reviews projects through each major phase of planning, financing, design and construction.

Back to top.

Tim Byrne, President

Tim Byrne is the President and Chief Executive Officer of Lincoln Property Company's Residential Division. He is actively involved in the decision-making, development and review of all projects, from early planning stages through financing, design, construction and lease-up. Since joining Lincoln as President in 1984, Mr. Byrne has been responsible for the development and planning of over 45,000 units and oversees the management of the Lincoln portfolio throughout the country.

Mr. Byrne joined Lincoln Property Company from the Dallas-based Byrne Company, a residential and commercial development company he founded in 1976. A native of Dallas, Mr. Byrne received a degree in business administration from the University of Texas. Mr. Byrne sits on various community boards and is a member of the Board of Directors of the National Multi Housing Council, the Urban Land Institute and past Board Member of the Real Estate Council.

Back to top.

Brian Byrne, Senior Vice President – Western Midwest

Brian Byrne is Senior Vice President and Operating Partner for Lincoln Property Company – Midwest. His responsibilities include development, acquisition and management oversight of Lincoln's operations in the Midwest.

He is also responsible for tracking market conditions, which affect properties under Lincoln's management.

Mr. Byrne joined Lincoln in 1985 as Development Manager where he worked with the Operating Partners to oversee the development process for all new projects. He became Senior Vice President/Operating Partner in 1991. Prior to his association with Lincoln Property Company, Mr. Byrne was the Vice President of Development at Byrne Development Company from 1981 to 1985. His responsibilities included overseeing all planning, development, design and construction processes. Mr. Byrne graduated from Texas Tech University with a Bachelor of Architecture degree in 1974. He is a registered architect and holds a National Council of Architectural Registration Board Certification. He is a member of the Urban Land Institute and the American Institute of Architects.

Back to top.

Jeffry T. Courtwright, Senior Vice President – Southwest

Jeff Courtwright is Senior Vice President and Operating Partner for Lincoln Property Company – Southwest. His responsibilities include development, acquisition and management oversight of Lincoln residential operations in the Southwest.

Mr. Courtwright joined Lincoln's commercial division in 1987. He was promoted to Vice President of Office Development in 1991 for office projects in the Dallas/Fort Worth area. In 1993, Mr. Courtwright was named Senior Vice President and expanded his responsibilities to include acquisitions of non-performing loans and distressed assets as well as regional management companies and oversight of facilities management contracts. Mr. Courtwright left Lincoln in 1995 to join Prentiss Properties as Managing Director of the Southwest U. S. commercial operations. He returned to Lincoln in his current capacity

in October 1996. A licensed real estate broker, Mr. Courtwright is a graduate of Southern Methodist University, a former member of the Central Association's Executive Committee, and a council member of the National Association of Industrial and Office Parks.

Back to top.

Reggie D. Delponte, Senior Vice President – California

Reg DelPonte is Senior Vice President and Operating Partner for Lincoln Property Company – California. Mr. DelPonte opened the Western Region office in September 1998. His responsibilities include all residential development in California as well as acquisition of existing properties or portfolios. Since opening the office, he has developed over 2,000 multi-family units and acquired a portfolio of 3,500 existing units.

Prior to joining Lincoln, Mr. DelPonte was President of Calco Investments and in 1983 formed DelPonte Companies, which developed mixed use commercial and industrial business parks with a total of 2.5 million square feet of development. Mr. DelPonte began his real estate career as a commercial real estate broker with Grubb & Ellis Commercial Brokerage Company in 1979 where he received numerous awards, including Overall Top Producer for two consecutive years.

Mr. DelPonte is a native of Denver and a member of the Urban Land Institute.

Back to top.

Jeff B. Franzen, Senior Vice President – Mid Atlantic

Jeff Franzen is Senior Vice President and Operating Partner for Lincoln Property Company – Northeast/MidAtlantic. Mr. Franzen opened the Washington DC office for Lincoln in 1985 and directs all of Lincoln's

residential operations from New England to North Carolina. His region currently manages over 12,500 apartment units.

Mr. Franzen currently serves on the Boards of the National Multi-Housing Council [*sic*] the Women's Center of Northern Virginia and is active in the Urban Land Institute serving as Vice Chairman of the Program Council. A native of Dallas, Mr. Franzen received a BBA from Southern Methodist University in 1976 and an MBA from the University of Dallas in 1979. Mr. Franzen is licensed as a real estate broker in most of the eastern United States and is an active CCIM candidate.

Back to top.

Kevin Keane, Senior Vice President – Eastern Midwest

As Senior Vice President and Operating Partner for the Lincoln Property Company – Midwest, Mr. Keane is responsible for overseeing development, financing and monitoring ongoing property management activities throughout Pennsylvania, Ohio, Michigan, West Virginia and Kentucky. Mr. Keane also tracks market conditions, which affect cities throughout the Midwest markets. He then determines which markets and sub-markets in which to concentrate real estate development and value added real estate investments. Mr. Keane is also involved in the financing, sale, development, construction and management of all the apartment communities in his region.

Prior to joining Lincoln in 1988, Mr. Keane was a Vice President with a mortgage banking company where he was responsible for the placement of institutional equity and debt for existing and to be developed real estate. While employed as a mortgage banker, Mr. Keane procured in excess of $250,000,000 in debt and equity financing for all types of institutional quality income producing properties. Mr. Keane holds a Bachelor of Science in

Business Administration in Real Estate and Insurance from the Pennsylvania State University.

Back to top.

Charles O. Shallat, Senior Vice President – Southeast

Mr. Shallat is Senior Vice President and Operating Partner for Lincoln Property Company – Southeast. Mr. Shallat is responsible for overseeing development, financing and monitoring on-going property management activities in the Southeast. Since joining Lincoln in 1996, the Southeast region has closed over $300 million in transactions, encompassing both new development and acquisition/rehabilitations. Mr. Shallat's region also manages apartment units for its own account as well as for third parties.

Mr. Shallat joined Lincoln from JPI Development Partners, Inc., where he was the Regional Acquisition Director. He was responsible for the acquisitions of multifamily properties in the Southeast. Prior to JPI, Mr. Shallat was Senior Acquisitions Associate at Metric Realty, an institutional pension fund advisor. Mr. Shallat holds a Bachelor's degree in Economics/Marketing/Management from the University of Illinois, Champaign/Urbana. Mr. Shallat is currently a member of the National Multihousing Counsel and a past Board Member of the East Coast REIAC Chapter.

Back to top.

Anthony V. Ianuale Jr., Vice President – Northeast

Mr. Ianuale is Vice President and Operating Partner for Lincoln Property Company – Northeast. His responsibilities include all residential development for the Northeast as well as acquisitions of existing properties or portfolios.

Prior to joining Lincoln in 1998, Mr. Ianuale was a Development Director for AvalonBay Communities, a residential REIT. He completed permitting and commenced development of several luxury multi-family developments in the Boston area, Providence, Rhode Island and Connecticut. He worked as a development manager for LaSalle Partners for five years in the early 1980's and was responsible for the development of commercial property including a complete rehabilitation and expansion of the landmark News Building in New York City. After LaSalle Partners, Mr. Ianuale joined the Druker Company, a high-quality developer of mixed-use, office, hotel and residential property based in Boston, Massachusetts. Mr. Ianuale received his BSME (Mechanical Engineering) from the University of Virginia in 1978 and his MBA from the Amos Tuck Graduate School of Business Administration at Dartmouth College in 1980.

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John Noone, Vice President

John J. Noone is a Vice President and Operating Partner for Lincoln Property Company – New England. His responsibilities include all residential development for New England as well as acquisitions of existing residential properties and portfolios.

Prior to joining Lincoln Property Company, Mr. Noone was a Senior Vice President for Sunrise Development Inc., the real estate development subsidiary of Sunrise Assisted Living, Inc., a NYSE publicly traded company. He completed the permitting and construction for all real estate development activities throughout New England and New York. Mr. Noone successfully developed over $250,000,000 worth of new residential development projects on behalf of Sunrise Development, Inc. Mr. Noone has over 16 years experience in urban planning, property management, finance and development.

Mr. Noone graduated Bentley College with a BS in Finance. He serves as Trustee for a not for profit housing corporation, and also serves on the Real Estate Transportation and Development Committee for the Greater Boston Chamber of Commerce. Mr. Noone is a licensed real estate broker in the Commonwealth of Massachusetts.

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David C. Martin, Vice President Acquisitions – Southwest

Dave Martin brings sixteen years of real estate and capital markets experience to Lincoln Property Company's multifamily acquisitions efforts in the southwestern U.S.

Prior to his time at Lincoln, Dave was the lead banker in Nomura Asset Capital Corp.'s Dallas, Texas office, which he helped open and staff in July of 1997. Over the course of two years at Nomura, Dave structured and funded in excess of $600M of investments for commercial and residential real estate properties.

Dave began his career in Metropolitan Life Insurance Company's Real Estate Investments Department, and held a number of positions during his 11-year tenure – including two-year assignments in both London, England and MetLife's Real Estate Investment Committee operations in Atlanta, Georgia.

Dave earned an undergraduate degree in finance from Texas A&M University in May 1986, and obtained a Graduate Certificate in finance from Southern Methodist University in May 1997.

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★★★★★

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed June 13, 2003]

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PREVIOUSLY FILED MOTION FOR REMAND PURSUANT TO 28 USC 1447(c)

[Introduction and Part I.A omitted]

B. THE EQR/LINCOLN LIMITED PARTNERSHIP ISSUES

Here, remand is required for at least two reasons. First, the three defendants have not been identified as citizens of other than Virginia states at the time of the filing of the Motion for Judgment. (As previously argued, SWIB is an arm of the State and is not a citizen at all for purposes of diversity.) Second, the defendant Lincoln conceded that the real party (which it failed to identify in the Notice as well as in its Financial Disclosure) is EQR/Lincoln Limited Partnership. But, the Notice fails to identify the members of the defendant EQR/Lincoln LLP, and the Notice fails to allege any of the citizenships. [Defendant Lincoln, for the reasons stated above, cannot claim that it has amended its Notice by filing its

Memorandum in Opposition; but, the Court can review the entire record when diversity of citizenship and subject matter jurisdiction is challenged. See *Indianapolis v. Chase National Bank, supra.*] Furthermore, at no time has Lincoln in this record carried its burden to show that the real party of interest, EQR/Lincoln LLP, does not have a principal place of business outside of Virginia. [Even if it attaches another Affidavit challenging this, it comes too late. Lincoln was the architect of its own fatal, jurisdictional disaster by not including this information in the original Notice for Removal.]

Because the Notice fails to allege the jurisdictional requirements, either for the defendant Lincoln, SWIB, Invesco or the real party in action, EQR/Lincoln Limited Partnership, the defendants have failed to allege facts necessary to show both complete diversity and that none of the defendants are citizens of the Commonwealth of Virginia when the Motion for Judgment was filed.

Furthermore, even assuming (as defendants incorrectly do) that EQR/Lincoln Limited Partnership is a citizen only of the states in which it is organized and in which it has its "principal place of business," defendant EQR/Lincoln LLP's "principal place of business" likely is Virginia and not Delaware, or Texas, or any of the other numerous locations of the 'layer upon layer' of corporate entities which comprise "affiliates" [none of this was disclosed in the Financial Disclosure or in the Notice of Removal]. Upon information and belief, EQR/Lincoln Limited Partnership was established and exists for the primary purpose of profiting either from managing fees and ownership of Virginia apartment complexes. Pointing to this is the fact that EQR/Lincoln Limited Partnership filed a Certificate to do business in Virginia (12-29-97) [Ex. 3, Pls. Motion to Remand] shortly after it was organized under the laws of the State of Delaware (11-13-97) [Ex. 1 & 1B, Dfs. Opp.]. Shortly thereafter, Lincoln arranged with SWIB through Invesco, to start managing Westfields Village and other apartment complexes in the Northern Virginia in association with EQR/Lincoln

Limited Partnership. Further buttressing this is that Jeff Franzen [the Virginia citizen], who was disclosed in the discovery pleadings and in published material, as a "partner" with the defendant Lincoln, is not receiving any partnership benefits from EQR/Lincoln LLP. Yet, the Rule 30(b) designated corporate officer, Fred Chaney, testified that Lincoln is in fact a Partnership, which owns and manages Virginia properties through a partnership. This testimony is contradicted by subsequent Affidavits filed in Lincoln's Opposition.

For no other reason than the contradictions, confusions created, failures to disclose financial affiliates as required by the Rules, and the jurisdictional defects above, Lincoln has failed to carry its burden to show diversity. These issues are resolved, for the reasons stated in the argument above, in favor of remand to a court that has assured jurisdiction, namely, the Fairfax County Circuit Court.

If, for no other reason other than the fact that Lincoln failed to name the true party in interest, EQR/Lincoln LLP, in its Notice of Removal, there is a jurisdictional defect. It never disclosed facts of citizenship that would actually permit this Court to determine the citizenship of the limited liability company. The Notice did not identify the members of the LLP, let alone provide facts from which the citizenships of those members could be determined when the Motion for Judgment was filed. As noted above, the time for amending the Notice to include such facts has long passed. Accordingly, on this ground alone, remand is required. And, this is the same finding that Judge Ricardo Urbina reached in *Pauline Johnson-Brown v. 2200 M Street, LLC*, 2003 U.S. Dist. LEXIS 5947 (D. C. 2003), attached as Exhibit 1 to the plaintiffs' original Motion to Remand. There, the District Court ruled that if at any time prior to final judgment it becomes clear that there is a defect in removal procedures, or that the removal court lacks subject matter jurisdiction, the removal court must remand the court to the state court from which the defendants originally removed the case. Because the

defendants there failed to recognize the basic concept that corporate citizenship is limited to corporations, and because the defendants misidentified the citizenship of the LLC defendants, "and so they have failed to prove that the parties are diverse and that the court has subject matter jurisdiction under 28 USC 1441(a) (b). Accordingly, the Court grants the plaintiffs' Motion to Remand the case to the Superior Court." *Id.*

Judge Urbina recognized that the defendants misidentified their citizenship by misapplying the corporate-citizenship standard, and that the court therefore could not exercise jurisdiction over the matter. He followed the Supreme Court standard that he strictly construe removal status because of federalism concerns, citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). He also recognized that, as here, where a removing party's jurisdictional allegations are challenged, that party bears the burden of proving these allegations by a preponderance of the evidence. "Where the need to remand is not self-evident, the court must resolve any ambiguities concerning the propriety of removal in favor of remand. *University of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999); *Nwachukwu v. Karl*, 223 F. Supp. 2d 60, 66 (D. D.C. 2002). Finally, the defendants bear the burden of proving the propriety of removal, and if the defendant cannot meet this burden, the Court must remand the case. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Nat'l Org. for Women v. Mutual of Omaha Ins. Co.*, 612 F. Supp. 100, 101 (D. D.C. 1985) *(Flannery J.); Gateway 2000, Inc. v. Cyrex Corp.*, 942 F. Supp. 985, 989 (D. N.J. 1996)." *Johnson-Brown, supra.*

Perhaps the defendants were ready to gamble that any jurisdictional defect, in this case, the absence of complete diversity, would escape detection, then disappear prior to judgment. Or, perhaps they did not see the likely outcome of an unwarranted removal – a swift and non-reviewable remand order pursuant to 28 USC §§ 1447(c)(d), which could be attended by the invoking of

payment of costs pursuant to the statute because this Court's authority has been improperly invoked.

The missing allegations in the Notice cannot now be furnished; they are jurisdictional omissions. An effort to characterize their presentation as a mere bolstering of the "specificity" in their original Notice would be disingenuous. See *Black & Decker v. Twin City Fire Insurance Co.*, 1993 U. S. Dist. LEXIS 2838 (D. Md. 1993), citing *Hubbard v. Tripp, supra.* In *Castle & Big South Mining & Construction Company, Inc. v. Laurel Creek Co., Inc.*, 848 F.Supp. 62 (S.D. W. Va. 1994) the court denied leave to amend a removal notice after the 30 days:

> ". . . . the overwhelming majority of courts allow amendment after expiration of the statutory period for removal only for the purpose of setting forth more specifically *each* ground for removal which had been imperfectly set forth in the original petition. *Thompson v. Gillen*, 491 F.Supp. 24, 27 (E.D. Va. 1980), *Van Horne*[*v. Western Electric Co.*], 424 F.Supp. [1920,] 924 [(E. D. Mich. 1977)] (and cases cited therein), but deny leave to amend to supply missing allegations or to supply new allegations. *Thompson*, 491 F. Supp. at 27; *Richmond, Fredericksburg and Potomac R. Co.* [*v. Intermodal Services, Inc.*], 508 F. Supp. [804] 805 [(E.D. Va 1981)]." (emphasis added in original.) *Castle*, 848 F. Supp. at 64.

The court followed the restricted standard and stated that the appropriateness of the restricted position is buttressed by the clear and undisputed rule that removal statutes must be strictly construed *against removal.* "For example, in *Griffin v. Holmes*, 843 F. Supp. 81 (E. D. N.C. 1993), the court stated that when evaluating a motion for remand, it is the general rule that the 'removal statutes are to be strictly construed against removal, with any doubt in a particular case to be resolved against removal.'" (Citations omitted) *Id.* at 65.

The courts are uniformly strict on these jurisdictional issues. Pleading residency instead of citizenship would

not meet the jurisdictional requirement. Because there is a dispute as to the diverse citizenship of the parties, it is even more critical that the Notice for Removal permit the Court to know that both at the time the suit was commenced, and at the time of the Notice of Removal, that all the parties were citizens of diverse states. The Fourth Circuit District Courts have uniformally [*sic*] held that that is a jurisdictional, not a procedural, defect. See cases cited above.

In *Widdon Farms, Inc. v. Delta and Pine Land Company, et al.*, 103 F. Supp. 2d 1310 (S. D. Ala. 2000), the court held that an inadequate jurisdictional allegation in a notice of removal is, by its terms, a jurisdictional defect. It held that to properly invoke federal diversity jurisdiction, the notice of removal must provide all the requisite factors of diversity jurisdiction at the time removal is attempted. The court held that where a notice of removal fails to identify jurisdictional elements, it is unlikely that the court could determine whether there is complete diversity between the parties. In such a situation, the court held that it must remand the case because the removing defect has not met its burden of demonstrating the propriety of the removal. "All doubts about jurisdiction should be resolved in favor of remand to state court." *University of S. Ala. v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999).

In 1991, two cases decided in the Pennsylvania Eastern District Court followed *Hubbard v. Tripp, supra*, in holding that even though the plaintiffs had not moved to remand, the court picked up on the jurisdictional defect when it realized that the Notice of Removal did not state the citizenship of the parties at the time the action was filed, and it was not disclosed in the complaint. The court in both of those cases held that subject matter jurisdiction could not be agreed to or conferred by consent of the parties. "A court is required to address the issue, particularly when it is raised on the face of the record." *Fox v. Kelly & Long Cable Electronics, Inc.*, 1991 U.S. Dist. LEXIS 5382 (E. D. Pa., Apr. 23, 1991); and *Burns v. G. S.*

Nelson Electric, et al., 1991 U.S. [*sic*] LEXIS 6259 (E. D. Pa., May 6, 1991). In both of these cases, the court referred to *Hubbard, supra*. In each case, the court held that since the complaint and the removal notice failed to allege a necessary jurisdictional fact, it had no jurisdiction. In reciting the familiar principle that removal statutes are to be strictly construed against removal and all doubts will be resolved in favor of remand, both actions were returned to state court.

SUMMARY

1. For the reasons stated above, the omission of the jurisdictional requirement to state the citizenship of the parties at the time the action was filed, this matter should be remanded.

2. Lincoln is a partnership whose diversity of citizenship has not been clearly shown; the real party is a limited liability partnership named EQR/Lincoln Limited Partnership whose principal place of business has never been averred or established in this record, and accordingly this Court cannot determine from the record whether it is a diverse party.

3. SWIB is a state agency. As an arm of the State of Wisconsin, it cannot be a "citizen" under the strictly construed, limited jurisdiction mandates of the United States Supreme Court and the Fourth Circuit Court of Appeals. Federalism and state sovereignty concerns in the Fourth Circuit mandate remand under these circumstances.[2]

Respectfully submitted,
CHRISTOPHE ROCHE
JUANITA ROCHE
By Counsel

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[2] It is respectfully requested that these arguments are applicable to the initial Motion to Remand under 28 USC Section 1447(c), or if the Court has entered a Final Judgment at the time this Memorandum has been filed, then under the Rule 60(b)(4) Motion to void a judgment for lack of subject matter jurisdiction.

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(8)

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No. 04-712

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY and
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHER ROCHE and JUANITA ROCHE,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b).

2. Whether a limited partnership's citizenship for diversity jurisdiction subject-matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

WLF is a non-profit public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.[1] WLF regularly files briefs in this Court and other federal and state courts in cases in which the procedural fairness afforded the defendant can reasonably be called into question. *See, e g , Baxter International Inc. v. Asher*, *cert denied*, 125 S. Ct. 1639 (2005); *3M Co. v Johnson*, 895 So.2d 151 (Miss. 2005). In particular, WLF has participated in cases in which it believes the courts have unduly restricted the rights of defendants in a state court action to remove the case to federal court. *See, e g , American Home Products Corp v Collins, cert. denied*, 125 S. Ct. 1823 (2005).

WLF fully supports Petitioners' request that the Court reverse the appeals court's judgment and hold that Petitioners properly removed this case from state to federal court. WLF writes separately in order to emphasize its particular concern over the manner by which the appeals court reached its decision: it began by declaring that all removal statutes should be "strictly construed" against the defendant seeking removal, and that "all doubts" should be resolved in favor of remanding such cases to state court. Pet. App. 7a Although this Court's

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[1] Pursuant to Supreme Court Rule 37 6, WLF states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief WLF submits this brief in support of Petitioners with the written consent of all parties The written consents are on file with the Clerk of the Court

precedents, properly understood, do not support creation of a presumption against removability, lower federal courts are invoking such a presumption with increasing frequency to justify remand orders. WLF is submitting this brief in hopes that the Court will provide guidance to the lower federal courts on that issue.

WLF is also concerned that if affirmed, the Fourth Circuit's decision will significantly impair the right of out-of-state defendants to remove cases to federal court pursuant to the federal courts' diversity jurisdiction – thereby frustrating the intent of Congress that such cases be removable as a means of ensuring that out-of-state defendants can have their cases heard in an impartial forum.

STATEMENT OF THE CASE

Congress has determined that, in general, parties sued in a State court are entitled to remove the case to federal court if the federal district courts have original, diversity jurisdiction over the action. 28 U.S.C. § 1441. In determining whether diversity jurisdiction cases are removable, Congress has instructed courts to focus on the citizenship of only those defendants who have been "properly joined and served." *Id.* This case tests whether the heretofore uniformly recognized definition of a "properly joined and served" defendant should be expanded substantially (as the Fourth Circuit held), thereby significantly impairing the ability of defendants to exercise their statutory right to removal – a right that has existed throughout our nation's history.

This petition involves a lawsuit filed in Virginia state court for damages allegedly sustained by Respondents Christopher and Juanita Roche as a result of their lease of a residential apartment in Fairfax County, Virginia. The Roches

allege that toxic mold present in their apartment caused and exacerbated certain medical conditions, and that some of their personal property was misplaced or stolen while defendants were taking steps to eliminate the mold. Pet. App. 1a. The Roches filed suit in August 2002, asserting a variety of state statutory and common law claims. Named as defendants were Lincoln Property Co. ("Lincoln"); the State of Wisconsin Investment Board ("SWIB"), the owner of the residential development in which the Roches resided; and Invesco International. The issues before the Court turn solely on the citizenship of Lincoln and its affiliates.[2]

The defendants promptly removed the case to the U.S. District Court for the Eastern District of Virginia, invoking diversity jurisdiction. The Roches are citizens of Virginia, and in their removal papers the defendants contended that they were not citizens of Virginia. The district court agreed and denied the Roches' efforts to have the case remanded to state court *Id* 84a-93a. The district court held that Lincoln should be deemed a citizen of Texas because it is incorporated in Texas and has its principal place of business there. *Id* 86a-87a. The district court also held that even if one took into consideration the citizenship of EQR Lincoln Limited Partnership ("EQR"), a Lincoln affiliate that does business in Virginia but was not named as a defendant, diversity jurisdiction still existed – because EQR is not a citizen of

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[2] Invesco was dismissed from the case in November 2002 It is not a party before this Court, the Roches do not challenge the dismissal order, and no party has suggested that Invesco's status has any bearing on the removal jurisdiction of the federal courts in this case Similarly, although there was some dispute in the lower courts regarding whether SWIB should be deemed a citizen of Wisconsin, neither SWIB's citizenship nor the relevance of that citizenship to removal jurisdiction is before the Court

Virginia (by virtue of the fact that it is a limited partnership and none of its partners is a Virginia citizen). *Id.* 87a-88a. After, the district court entered judgment on the merits in favor of Lincoln and SWIB, the Roches appealed the denial of their remand motion.

On appeal, the Fourth Circuit reversed the district court's conclusion that the case had been properly removed, and directed the district court to remand the case to Virginia state court. Pet. App. 1a-19a. The court held that, for purposes of determining whether diversity jurisdiction existed, the citizenship of "the Virginia subsidiary" (*i e* , EQR) should be taken into account because – by virtue of EQR's status as a Lincoln affiliate that carried out much of the day-to-day management responsibilities at the Roches' apartment complex – it should be deemed a "real party in interest." *Id* 16a. The appeals court further held that Petitioners had failed to meet their burden of establishing that EQR was not a citizen of Virginia; the court based that holding on findings that: (1) EQR "owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth, which is much stronger that any nexus to Texas made apparent by the record," *id* ; and (2) Petitioners had provided insufficient evidence to meet their burden of establishing that all of EQR's partners (including its limited partners) were not citizens of Virginia. *Id* 12a-14a.[3]

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[3] The Roches contend that the Fourth Circuit actually based its holding on a finding that Lincoln itself was a citizen of Virginia, they argue that the appeals court held that the "Lincoln Property Company" named in the complaint was a limited partnership and that Petitioners had failed to carry their burden of demonstrating that all of the partnership's limited partners were not Virginia citizens Opp Br 5, 6, 14 That contention is without merit The Fourth Circuit very clearly understood that "the nominal and ultimate parent company, Lincoln (continued)

Underlying the appeals court's entire consideration of the remand issue was its conclusion that the removal statutes should be strictly construed against defendants seeking to exercise their removal rights. The appeals court explained its understanding of the law as follows:

> [I]t is well-settled that courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court. *Shamrock Oil & Gas Corp v Sheets*, 313 U.S. 100, 108-09 (1941); *Dixon v Coburg Dairy,* 369 F.3d 811 (4th Cir. 2004) (*en banc*) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated. Therefore, '[i]f federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (citations omitted).

Id 7a. Each of the Fourth Circuit's principal findings – that EQR, although not named as a defendant, should be deemed a real party in interest for purposes of determining diversity jurisdiction; that EQR should be deemed a Virginia citizen because of its "very close nexus" to Virginia; and that Petitioners had failed to carry their burden of establishing that EQR's limited partners were not Virginia citizens – was

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[3] (continued)
Property Company, is a Texas citizen " Pet App 16a The Fourth Circuit based its holding not on a finding that Lincoln was a Virginia citizen, but rather on a finding that Lincoln had failed to establish that EQR, "the Virginia subsidiary" and "the real and substantial party in interest," was not a citizen of Virginia *Id* Indeed, there would have been no reason whatsoever for the appeals court to have engaged in its "real party in interest" analysis if it had truly determined – as alleged by the Roches – that the named defendant, Lincoln Property Company, was a Virginia citizen

significantly colored by the court's understanding that removal jurisdiction should be strictly construed against Petitioners.

SUMMARY OF ARGUMENT

In holding that removal statutes are to be "strictly construed" and that "all doubts" regarding removability are to be resolved "in favor of remanding the case to state court," Pet. App. 7a, the Fourth Circuit finds itself well within the mainstream of lower federal court decisions. Over the past 60 years, the lower federal courts have grown increasingly hostile to diversity jurisdiction in general and, in particular, to cases removed to federal court on the basis of diversity of citizenship.

Many of these presumption-against-removability decisions purport to rely on decisions of this Court. WLF respectfully submits that all such reliance is in error; no decision of this Court has ever endorsed a presumption against removability or mandated that "all doubts" regarding removability should be resolved in favor of ordering remand. WLF agrees with Petitioners that remand in this case was wholly unwarranted – regardless whether one accepts the Fourth Circuit's presumption against removability. But WLF believes nonetheless that the likelihood of error would have been reduced significantly if the appeals court had not applied its ill-considered presumption. Accordingly, WLF urges the Court to provide guidance to the lower federal courts by stating explicitly that removability is to be determined solely on the basis of the governing statutory language and not on the basis of any presumptions for or against removability.

In support of its presumption against removability, the Fourth Circuit cited this Court's 1941 *Shamrock Oil* decision. Pet. App. 7a. Far from creating any general presumption

against removability, *Shamrock Oil* stated explicitly that its decision "turn[ed] on the meaning of the removal statute." *Shamrock Oil*, 313 U.S. at 104. The statute at issue had been adopted in 1887, and it unquestionably cut back on removal rights created by an earlier removal statute, adopted in 1875. The Court also determined that removal statutes adopted in the decades after 1887 evidenced a congressional policy of "strict construction" of removal statutes *Id* at 108. But the Court ruled against removability of the case before it based solely on that statutory history, not based on federalism concerns or any other general policy considerations. Accordingly, the Fourth Circuit's reliance on *Shamrock Oil* was misplaced.

The early twentieth century congressional policy of strictly limiting removal rights is no longer in place. Numerous federal statutes adopted in recent decades have expanded removal rights. Most recently, the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4, significantly expands the right of defendants to remove putative class action lawsuits to federal court. There is no longer any statutory basis for inferring a congressional intent that removal statutes be strictly construed against removability. Recent decisions of this Court have decided removability questions solely by reference to the relevant statutory language, without any mention of a presumption against removability. *See, e g*, *Breuer v Jim's Concrete of Brevard, Inc*, 538 U.S. 691 (2003), *Murphy Bros, Inc. v Michetti Pipe Stringing, Inc*, 526 U.S. 344 (1999).

Indeed, the Fourth Circuit's generalized presumption against removability is inconsistent with the Framer's understanding of the important roles that diversity jurisdiction and removal jurisdiction were to play in our federal system of government. Throughout our nation's history, the right to remove cases to federal court has played an important role in

ensuring that out-of-state defendants have available to them an impartial judicial forum. The hostility displayed by some federal district judges to removal jurisdiction appears to be based in part on a misguided belief that cases raising state law issues are most appropriately heard in State courts. To the contrary, it is no less important today than it was in the 1780's to ensure that out-of-state litigants have a means of avoiding State courts, which have a natural tendency to favor in-state litigants.

Given the Framer's strong endorsement of diversity jurisdiction and removal jurisdiction, it is somewhat anomalous to suggest that removing cases from State court to federal court in some way violates notions of federalism. Nor do principles of comity counsel in favor of strict construction of removal statutes. Indeed, because State court judges have been complaining at least as loudly in recent years as have federal judges regarding overcrowded dockets, it is highly unlikely that State court judges consider it an affront to their dignity when recently filed cases are removed from their dockets at the request of one of the parties.

The Fourth Circuit's unwarranted adoption of a presumption against removability caused it to conclude erroneously that the district court was required to remand the case to State court. Similar presumptions adopted by numerous other federal courts are improperly denying a federal forum to numerous defendants. WLF respectfully requests that the Court's decision state explicitly that the Fourth Circuit erred in deciding this case on the basis of a generalized presumption against the removability of cases from State court to federal court.

ARGUMENT

I. The Fourth Circuit's Presumption Against Removability Is an Invention of the Lower Federal Courts that Has No Foundation in This Court's Decisions and Is Contrary to Normal Principles of Statutory Construction

Underlying the appeals court's entire consideration of the remand issue was its conclusion that the removal statutes should be construed strictly against defendants seeking to exercise their removal rights. The court held that it is "well-settled" that courts should "resolve all doubts in favor of remanding the case to state court." Pet. App. 7a. It further held that "significant federalism concerns" implicated by removal jurisdiction makes "necessary" the remand of removed cases whenever "federal jurisdiction is doubtful." *Id* That presumption against removability has no foundation in this Court's decisions and is contrary to normal rules of statutory construction. That presumption led the Fourth Circuit to conclude erroneously that the case should be remanded to State court.

Unfortunately, the Fourth Circuit is not alone among the lower federal courts in erroneously adopting a generalized presumption against removability. That presumption has been cited by scores of federal court decisions as the basis for remanding cases to State court [4] In light of the widespread

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[4] *See, e g , Russell Corp v American Home Assurance Co ,* 264 F 3d 1040, 1050 (11th Cir 2001), *Danca v Private Health Care Systems, Inc ,* 185 F 3d 1, 4 (1st Cir 1999), *Tran v Waste Management, Inc ,* 290 F Supp 2d 1286,1291-92 (M D Fla 2003), *Shadie v Aventis Pasteur, Inc ,* 254 F Supp 2d 509, 514 (M D Pa 2003), *Murphy v*

(continued)

misperception among the lower federal courts regarding the existence of such a presumption, WLF urges the Court to provide guidance to the lower federal courts by stating explicitly that removability is to be determined solely on the basis of the governing statutory language and not on the basis of any presumptions for or against removability.[5]

Virtually all of these cases (including the Fourth Circuit below, Pet App. 7a) cite *Shamrock Oil* in support of the existence of a generalized presumption against removability. Far from creating any general presumption against removability, *Shamrock Oil* stated explicitly that its decision "turn[ed] on the meaning of the removal statute." *Shamrock Oil,* 313 U.S. at 104.

Because that decision has been so widely misinterpreted, a detailed discussion of the case's actual holding is warranted. The plaintiff Shamrock Oil (a noncitizen of Texas) had filed suit against Sheets (a Texas citizen) in Texas state court to collect on a debt. When Sheets filed a counterclaim based on an unrelated breach of contract, Shamrock Oil sought to remove the counterclaim to federal court. The then-applicable removal statute (which dated from 1887) provided for removal of a cause of action only "by the defendant or defendants therein." 28 U.S.C. § 71 (1940). The Court rejected

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[4](continued)
Newell Operating Co , 245 F Supp 2d 316, 318 (D Mass 2003), *Alessi v Beracha*, 244 F Supp 2d 354, 356 (D Del 2003), *Curtin v Port Authority of New York and New Jersey*, 183 F Supp 2d 664, 667 (S D N Y 2002), *Premier Holidays Int'l , Inc v Actrade Capital, Inc* , 105 F Supp 2d 1336, 1338 (N D Ga 2000)

[5] Such guidance is particularly appropriate in light of the statutory bar on appeals from remand orders, a bar that renders erroneous remand orders largely uncorrectable *See* 28 U S C § 1447(d)

Shamrock Oil's claim that it should be deemed a "defendant" within the meaning of the statute. 313 U.S. at 107. The Court noted that: (1) under the removal statute in effect from 1789 to 1875, plaintiffs in Shamrock Oil's position had been denied the right to remove counterclaims to federal court; (2) in 1875, Congress adopted a significantly liberalized removal statute that, *inter alia*, provided explicitly for removal by plaintiffs as well as by defendants; and (3) in 1887, Congress adopted a more restrictive removal statute that omitted any reference to removal by plaintiffs and adopted language substantially similar to the language of the 1789 removal statute. 313 U.S. at 104-06. Based on the 1887 statute's omission of any reference to removal by "plaintiffs" and the history of denying removal rights to plaintiffs before they were explicitly granted such rights in 1875, the Court concluded that Congress, when it adopted the 1887 statute, intended to eliminate the right of plaintiffs to remove cases to federal court *Id* at 107. In other words, the Court's decision was based primarily on its interpretation of Congress's intent in adopting the 1887 removal statute. Indeed, the Court stated explicitly that "at the outset it is to be noted that decision turns on the meaning of the removal statute" adopted by Congress in 1887. *Id* at 104.

The Court concluded its decision with the passage that has given rise to holdings by many federal courts that there exists a generalized presumption against removability:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by

> the action of Congress in conformity to the Judiciary articles of the Constitution "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v Ratta*, 292 U.S. 263, 270 (1934).

Id at 108-09.

Shamrock Oil's language cannot plausibly be interpreted as creating a presumption against removability that is based on anything more than an interpretation of relevant congressional statutes. The Court said that its call for "strict construction" of the 1887 removal statute was based solely on "the policy of the successive acts of Congress regulating the jurisdiction of the federal courts." *Id* [6] Accordingly, a determination that there exists a present-day "strict construction" requirement cannot rely on *Shamrock Oil*, which was based on an examination of late nineteenth century and early twentieth century statutes [7]

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[6] The Court did not specify which "successive acts of Congress" it had in mind One can surmise that the Court was referring to successive statutes that gradually increased the minimum dollar amount in controversy necessary to invoke federal court jurisdiction That surmise is based on the fact that *Healy v Ratta*, the case referenced in the text, addressed an issue regarding whether the amount in controversy met the jurisdictional minimum

[7] Nor can the Fourth Circuit justify its presumption against removability by pointing to *Shamrock Oil*'s "rightful independence of state governments" language That language says no more than that federal courts should not extend their jurisdiction any farther than the "precise limits" authorized by Congress 313 U S at 109 Nothing in that language suggests the rule adopted by the Fourth Circuit that "all doubts" regarding removability should be resolved "in favor of

(continued)

Nor is there any constitutional basis for disfavoring removal jurisdiction. As this Court has repeatedly recognized, Article III of Constitution authorizes federal court jurisdiction over any lawsuit in which there is even "minimal diversity"; "complete diversity," generally required for maintaining diversity jurisdiction, is a requirement imposed solely by statute. *State Farm Fire & Cas Co v. Tashire*, 386 U.S. 523 531 (1967).

The early twentieth century congressional policy of strictly limiting removal rights is no longer in place; in the absence of such a congressional policy, the Fourth Circuit's presumption against removability cannot be justified. The most recent evidence that Congress does not mandate a presumption against removability is its adoption earlier this year of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L 1092, 119 Stat. 4. Section 5 of CAFA significantly expands the right of defendants to remove putative class action lawsuits from State courts to federal court by, among other things, abolishing the "complete diversity" requirement in such cases. CAFA justified its expansion of removal jurisdiction in part by explicit findings that State courts are "sometimes acting in ways that demonstrate bias against out-of-State defendants" and that litigation abuses in State courts "undermine . . . the concept of diversity jurisdiction as intended by the framers of the United States Constitution." CAFA, § 2(a)(4). *See also* 109 S. Rep. 14, 109th Cong., 1st Sess., § IV(B)(1) (Feb. 28, 2005) (CAFA is intended not only to protect against actual discrimination by State courts against non-citizens of the State, but also to prevent even the appearance of discrimination in favor of local residents).

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[7](continued)
remanding the case to state court " Pet App 7a

Amendments to the removal statutes since 1948 have done nothing to contract removal jurisdiction to any material degree, and (as noted above in the case of CAFA) have often liberalized the rules governing removal. For example, between 1949 and 1965, the removal statutes provided that a defendant waived its removal rights unless it filed its removal petition within 20 days of receipt of the complaint. 28 U.S.C. § 1446(b) (1949); *see* Act of May 24, 1949, § 83(a), 63 Stat. 101. In 1965, Congress extended the period for removal from 20 days to 30 days (the current time period). *See* Act of September 29, 1965, 79 Stat. 887; *Murphy Bros* , 526 U.S. at 352 n.3.[8]

Similarly, before 1948, 28 U.S.C. § 1441(a) provided simply that any action within the original subject-matter jurisdiction of the federal courts could be removed, and did not specify when exceptions to that general rule would be appropriate. In 1948, Congress added to the statute a provision (which is still part of the law) mandating that actions within original subject matter jurisdiction are removable "except as

[8] *Murphy Bros* is a good example of the Court's post-*Shamrock Oil* pattern of deciding removal issues solely by reference to standard tools of statutory construction, rather than applying presumptions to interpret statutes arguably open to two different interpretations *Murphy Bros* interpreted § 1446(b) as providing that the 30-day removal period does not begin to run until after the defendant has actually received formal service of the complaint, even though the statutory language at issue ("thirty days after the receipt by the defendant, through service *or otherwise*, of a copy of the [complaint]") could very plausibly have been interpreted as providing that the 30-day period begins to run as soon as the defendant receives the complaint from any source – including a courtesy copy sent through the mail The Court arrived at its interpretation using standard tools of statutory construction and simply ignored the plaintiff's arguments that *Shamrock Oil* required adoption of the plausible interpretation that would have entailed a remand

otherwise *expressly* provided by Act of Congress." Act of June 25 1948, § 1441(a), 62 Stat. 937 (emphasis added). The Court later interpreted the "expressly provided" clause as mandating that the right to removal will never be deemed precluded based on statutory language that only *arguably* precludes removal. *Breuer*, 538 U.S. at 697.[9]

In sum, nothing in this Court's case law required the Fourth Circuit to bias its consideration of this case by invoking a presumption against removability and resolving all doubts in favor of remanding the case to State court. By relying on a presumption not based on congressional statutory commands, the Fourth Circuit erroneously departed from normal rules of statutory construction.

II. The Framers Intended the Federal Courts to Be Open to Diversity Cases, Including Both Cases Originally Filed in Federal Court and Ones Removed to Federal Court by Out-of-State Defendants

By asserting that federal removal jurisdiction must be construed "strictly" because it raises "significant federalism concerns," Pet. App. 7a, the Fourth Circuit signaled its contention that removal jurisdiction is at least to some extent at odds with the Framers' vision regarding operation of the federal courts. That contention is erroneous; to the contrary,

[9] The Court explicitly and unanimously rejected arguments that *Shamrock Oil* required the Court to interpret the ambiguous statute as precluding the right to removal After quoting *Shamrock Oil*'s "strict construction" language, the Court said, "But whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development," citing the 1948, post-*Shamrock Oil* addition of the "except as otherwise expressly provided" clause to 28 U S C § 1441(a) *Breuer*, 538 U S at 697

diversity jurisdiction and removal jurisdiction were contemplated by the Framers as playing a vital role in our federal system of government. Given the important role that the right to remove cases to federal courts has played in ensuring that out-of-state defendants have available to them an impartial judicial forum, the Court should carefully examine any efforts by the federal appeals courts to cut back on removal rights.

The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 533 (2d ed. 1836). Similarly, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included within the "judicial Power" cases "between Citizens of different States." U.S. Const., Art. III, § 2.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to nonresident defendants sued in state court.

Section 12 of the Judiciary Act addressed that latter concern by authorizing a nonresident defendant sued by a resident plaintiff in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v Davis*, 100 U.S. 257, 265 (1880). This Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816).

The federal government's distrust of State court's ability to deal fairly with noncitizen litigants reached a peak in the period following the Civil War. In an effort to protect federal officers and freed former slaves, Congress adopted a series of laws that extended both the original and removal jurisdiction of the federal judiciary. This legislative initiative culminated in the Removal Act of 1875,[10] a law that not only vested federal courts with federal question jurisdiction for the first time, but also significantly expanded removal jurisdiction. Among other provisions, the 1875 law provided for removal

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[10] Act of Mar 3, 1875, ch 137, 18 Stat 470

of State court cases raising federal questions, permitted removal by plaintiffs, permitted removal of an entire lawsuit if it contained *any* controversy between citizens of different states, and provided for appellate review of remand orders.

The experiment with greatly expanded removal jurisdiction lasted only 12 years, when the Judiciary Act of 1887 largely eliminated the expansions adopted in 1875 *See* Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. In particular, the 1887 statute eliminated the right to removal by plaintiffs and by resident defendants. Importantly, however, the 1887 statute was not viewed as an abandonment of the Framers' commitment to diversity jurisdiction and removal jurisdiction To the contrary, the 1887 largely restored the law regarding removal of diversity jurisdiction cases to the provisions contained in the Judiciary Act of 1789. As the Court recognized in *Lee v Chesapeake & Ohio Ry Co* , 260 U.S. 653 (1923), the right of removal should not be abridged beyond restrictions explicitly included in the 1887 statute:

> While the comparison between [the 1875 statute and the 1887 statute, as amended in 1888] shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be effected. Certainly there is nothing in this which suggests that the plain terms of the act of 1888 – by which it declared that any suit "between citizens of different states" brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "non-residents of that State" – should be taken otherwise than according to their natural and ordinary signification.

Lee, 260 U.S. at 660-61.

The Court's decision 18 years later in *Shamrock Oil* needs to be understood within the context of this history. *Shamrock Oil* correctly noted that the 1887 statute was adopted for the purpose of restricting the expanded removal jurisdiction created by the 1875 statute. The Court also correctly noted that "successive acts of Congress" had restricted removal jurisdiction somewhat by increasing the jurisdictional amount. *Shamrock Oil*, 313 U.S. at 108. The Court made those observations in support of its conclusion that Congress in 1887 had intended to eliminate plaintiffs' right to remove cases – a right that had not been included within the Judiciary Act of 1789 and had only been created in 1875. *Id* Understood in that context, *Shamrock Oil* should not be interpreted as a rejection of the Framers' embrace of removal jurisdiction as a integral part of our federalism. To the contrary, the Court endorsed a return to an understanding of removal jurisdiction that closely mirrored the Framers' understanding. In reminding lower federal courts that the should "scrupulously confine their own jurisdiction to the precise limits" ordained by Congress, *id.* at 109, the Court was merely reminding lower courts that the power to establish the jurisdiction of the lower federal courts is vested by the Constitution in Congress, not the courts themselves.

In sum, nothing in our constitutional history suggests that removal jurisdiction in diversity cases is in any way at odds with accepted notions of federalism. Some federal courts have expressed reluctance to exercise removal jurisdiction because of comity concerns; they view one court divesting another court of jurisdiction as somewhat unseemly and/or discourteous. *See, e g., Dardeau v West Orange-Grove Consolidated Indep School Dist.*, 43 F. Supp. 2d 722, 730 (E D. Tex 1999). But as one observer has cogently responded:

> [T]he comity argument appears somewhat contrived in the context of removal. State courts have given little indication that they consider it an affront to their dignity to have a case transferred to federal court. Given the persistent plea by many state courts that their dockets are overcrowded, a far greater concern of state courts may well be that the federal courts will relieve the congestion on their own dockets at the expense of state courts.

Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV 609, 660 (Spring 2004).

This Court in no uncertain terms has rejected suggestions that remand can be justified by a federal court's desire to reduce its backlog of cases. In reversing a remand order based on a district court's concerns that its docket was overcrowded, the Court stated: "An otherwise properly removed action may no more be remanded because a district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state court for such reason." *Thermtron Prods, Inc v Hermansdorfer*, 423 U.S. 336, 344 (1976).

WLF respectfully suggests that many district courts nonetheless will be sorely tempted to issue remand orders on precisely that grounds, albeit the remand orders will be couched in terms of federalism concerns. WLF urges the Court to guard against that temptation by making clear that federalism concerns generally do not justify remand orders, which instead should be issued only when mandated by the applicable congressional statute.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the judgment below.

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IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,

Petitioners,

—v.—

CHRISTOPHE ROCHE AND JUANITA ROCHE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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INTRODUCTION

May a non-public entity with an opaque web of affiliates use its organizational opacity as a device to manufacture diversity jurisdiction? The Fourth Circuit properly concluded that a party engaged in such jurisdictional gamesmanship failed to carry its burden of rebutting the presumption against federal jurisdiction.

Petitioners' Brief is predicated on a misconception of the Forum Defendant Rule, which is set forth in the last sentence of 28 U.S.C. § 1441(b). That sentence, by its terms, does not confer jurisdiction and is irrelevant. Yet, it lies at the heart of Petitioners' argument and the First Question that Petitioners have presented for review. Removal jurisdiction in this case was conferred not by § 1441(b) but rather by § 1441(a), which authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction. . . ." Original jurisdiction, in turn, was prescribed by 28 U.S.C. § 1332(a)(1), which requires complete diversity of citizenship.

Only if there is complete diversity within § 1332(a)(1) (and, thus, § 1441(a)) does one reach the Forum Defendant Rule of § 1441(b). The Forum Defendant Rule does not confer jurisdiction but is an exception that bars removal by an otherwise diverse defendant who is a citizen of the forum state. This exception is premised on the antecedent existence of complete diversity, absent which removal is barred for lack of subject matter jurisdiction, rendering the Forum Defendant Rule, as here, irrelevant.

Properly conceived, the First Question presented for review entails two constituent questions. *First*: In evaluating whether a "matter in controversy . . . is between . . . citizens of different States," within

§ 1332(a)(1), must the court ever consider the citizenship of an unnamed real party to the controversy? The answer to this question is affirmative, as this Court has ruled many times, in many jurisdictional contexts.

Second: Was remand required because Petitioner Lincoln Property Co. ("Lincoln") did not carry its burden of rebutting the presumption against federal jurisdiction (*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)), such that, in the words of 28 U.S.C. § 1447(c), it "appear[ed] that the district court lack[ed] subject matter jurisdiction?" The Fourth Circuit reasonably concluded that remand was required where Lincoln had been obfuscatory as to the proper party defendant among a web of non-public affiliates.

The Second Question presented by Petitioners rests on a mischaracterization of the opinion of the Court of Appeals. The Fourth Circuit did not rule that a limited partnership's citizenship for diversity purposes is determined by its "very close nexus" with the state, but rather that the existence of this nexus was further evidence of Lincoln's obfuscation.

The decision below made no new, bold pronouncements of law. It recognized and applied this Court's teaching that the question of complete diversity will "generally be answered by application of the 'real party to the controversy' test." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 188 n.1 (1990). It is consistent with this Court's disapproval of corporate use of affiliates as devices to manufacture federal jurisdiction. *See, e.g., Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327 (1895). The decision should be affirmed.

STATEMENT

This is a state law controversy brought in the Virginia state court by two Virginia citizens against Lincoln, a non-public entity that held itself out as the manager of Respondents' residential apartment building in Virginia, and two additional defendants. Respondents Christophe and Juanita Roche chose to litigate in state court, and at no time eschewed a Virginia defendant in favor of a defendant whose citizenship was diverse. There were very practical reasons for the Roches' preference for a Virginia state court forum—reasons that had telling consequences below. Virginia practice does not permit summary judgment based on affidavits or deposition testimony,[1] and Virginia has not adopted the rule of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) to assess expert evidence.[2] The District Court ultimately excluded the testimony of the Roches' medical expert on *Daubert* grounds (Pet. App. 20-21a) and, requiring the submission of affidavits and deposition tes-

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[1] *See* VA. CODE ANN. § 8.01-420 (2005); VA. SUP. CT. R. 3:18; *Gay v. Norfolk and Western Ry. Co.*, 253 Va. 212, 214, 483 S.E.2d 216, 218 (1997) ("Rule 3:18 and § 8.01-420 impose a very specific condition; namely, the parties must *agree* to the use of depositions before they may serve as a basis in whole, or in part, for the entry of summary judgment") (emphasis in original); *Monahan v. OBICI Med. Mgmt. Servs.*, 59 Va. Cir. 307, 313 (2002) ("Summary judgment can be entered based only on the plaintiff's pleadings and judicial admissions. . . . If discovery depositions play any role in the summary judgment analysis, it is as a weapon against the entry of summary judgment.") (citations omitted); *Bhalala & Shah, Inc. v. Quick Out Market, Inc.*, No. 131309, 1994 WL 1031171, at *2 (Va. Cir. Ct. May 2, 1994) ("An ex parte affidavit . . . may not form the basis for entry of a summary judgment."); 1 VIRGINIA CIVIL BENCHBOOK § IX[B] (2004).

[2] *John v. Im*, 263 Va. 315, 322, 559 S.E.2d 694, 697-98 (2002); *Goodman v. Hensley*, 66 Va. Cir. 65, 66 (2004).

timony (Pet. App. 26-27a), granted summary judgment because, *inter alia*, the Roches could not prove proximate causation once their expert testimony had been excluded. Pet. App. 30-31a, 34a.

As the Fourth Circuit found, Lincoln invoked the jurisdiction of the federal courts by obscuring the identity and citizenship of affiliates—operating under the "Lincoln" name—that were involved in managing the Roches' apartment complex. At no time prior to the denial of reconsideration in the Court of Appeals did Lincoln affirmatively identify the entity actually managing the apartment complex and, even then, it remained silent as to the corporate citizenship of one key affiliate—the corporate entity that signed the Roches' lease. The Court of Appeals appropriately held that such artful pleading and litigating, designed to shroud the identity of real parties to the controversy, was irreconcilable with Lincoln's burden of proving the existence of federal jurisdiction, and that the consequence of this lack of candor was appropriately borne by Petitioners as the parties seeking to divest the jurisdiction of the Virginia courts over this local dispute.

Actions Commenced. On August 26, 2002, the Roches each filed a Notice of Motion for Judgment and accompanying Motion for Judgment (the "State Court Complaints"), alleging state law tort, contract and other claims arising out of the presence of toxic mold in their apartment in the Westfield Village Apartments in Centerville, Virginia ("Westfield"). JA 25-50, 51-75. The Lincoln entity named in the State Court Complaints was "Lincoln Property Company t/a Lincoln Property Company ECW, Inc., Agent." JA 26, 52. Lincoln Property Company ECW, Inc. ("ECW I") is the signatory to the Roches' lease. JA 94. It is not the same corporation as Lincoln E.C.W. Property Management, Inc. ("ECW II"),

the entity belatedly identified by Lincoln as the limited partner in the limited partner of EQR/Lincoln Limited Partnership ("EQR"). The record is silent as to the corporate citizenship of ECW I or its role in the management or functioning of Westfield.

Removal and Consolidation. Petitioners' Notices of Removal dated September 17, 2002, list "Lincoln Property Co." in the caption without reference to ECW I (JA 76, 80), and identify Lincoln as a Texas corporation with its principal place of business in Texas (JA 77, 81). There is no mention in either Notice of Removal of ECW I or any other Lincoln affiliate.

The two actions filed by the Roches were consolidated into a single action in the District Court. JA 3. Petitioners filed motions to dismiss, which were granted with leave to replead. JA 4-5, 101-13. The Roches filed their Second Amended Complaint on December 16, 2002. JA 114-35.

Lincoln's Representations. In its answer to the Second Amended Complaint, Lincoln affirmatively represented that it was itself the manager of the Westfield property: "Lincoln admits that, by and through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia, it has managed the Westfield Village Apartments since 1996." JA 137. Nowhere in its answer did Lincoln disclose that its "regional offices" were in fact separate, affiliated entities. Nor did Lincoln identify who those affiliates were.

In its answer, Lincoln also acknowledged that it held itself out to the public as the property manager of Westfield: "Lincoln admits that it advertised in newspapers and in realtor brochures that it was the property manager of Westfield Village Apartments. . . ." JA 137.

Discovery of Lincoln's Partnership Characteristics. The Roches accepted Lincoln's representations to the Court and did not challenge jurisdiction. But jurisdictional issues arose in the course of merits discovery. On February 13, 2003, the Roches deposed Lincoln officer Fred E. Chaney, the "property manager for Lincoln Property Company and Senior Vice President." JA 175. Mr. Chaney testified three times that Lincoln was, in fact, a partnership, not a corporation:

> Q. And do you sit on the board of Lincoln Property?
>
> A. We're a partnership. I am a partner in new deals. We don't have a board.
>
> Q. And this is a limited liability corporation or company?
>
> A. We have multiple structures that we operate under.
>
> ***
>
> Q. Now, Lincoln, as you say, is a partnership?
>
> A. Yes.
>
> ***
>
> Q. And it is not a publicly offered entity since it is a partnership. Am I correct?
>
> A. Correct.

JA 175-76. Because this is the testimony of a Senior Vice President of Lincoln, each of these statements is an admission of Lincoln, under FED. R. CIV. P. 32(a)(2) and FED. R. EVID. 801(d)(2)(A), (C) and (D).

Ensuing discovery continued to highlight the partnership character of Lincoln:

- Lincoln's supplemental FED. R. CIV. P. 26(a)(1) disclosures identified Jeff B. Franzen as a "Senior Vice President/Partner Lincoln Property Co." JA 180-81.
- Mr. Franzen executed an affirmation accompanying Lincoln's supplemental answers to interrogatories in which he swore that he was a "Senior Vice President/Partner for Defendant Lincoln Property Co." JA 179.
- At the deposition of John LeBeau, who is identified as a Vice President of Lincoln Property Co. in its supplemental Rule 26 disclosures (JA 181), Mr. LeBeau testified that Mr. Franzen was the "highest ranking officer" at Lincoln's Herndon, Virginia, office and that Mr. Franzen was a "Senior Vice President, Partner." Mr. LeBeau indicated that he did not "know what he [Mr. Franzen] is a partner of." JA 274.

These, too, are admissions of Lincoln, under FED. R. CIV. P. 32(a)(2) and FED. R. EVID. 801(d)(2)(A), (C) and (D).

Admission of Affiliate's Existence. For the first time on March 18, 2003, Lincoln admitted the existence of an affiliate that was a real party to the controversy. In responding to a letter from the Roches' counsel below requesting financial information from Lincoln for purposes of punitive damages discovery, and in a transparent effort to minimize the magnitude of the revenues and profits disclosed, Lincoln's counsel wrote:

> I am writing in response to your March 13, 2003 letter requesting information concerning Lincoln's financial statements. Lincoln is willing to enter into a stipulation regarding the following financial information concerning EQR/Lincoln Limited Partner-

ship, the entity that receives the management fees for Westfield Village Apartments . . .

JA 236 (emphasis added). Although EQR was identified as the recipient of management fees for Westfield, there was no disclosure as to which Lincoln entity (or entities) performed management services at Westfield.

Dispositive Motions. On April 4, 2003, the parties argued Petitioners' *Daubert* and summary judgment motions, and the Roches' summary judgment motion. *See* JA 10-12. On April 16, 2003, the District Court entered an Order notifying the parties that the Court had granted Petitioners' *Daubert* and summary judgment motions, and denied the Roches' motion. Pet. App. 20-21a. The April 16th Order specified that it was not a "judgment" within FED. R. CIV. P. 54(a), and that a Memorandum Order and Judgment would be forthcoming. *Id.* The Memorandum Order and Judgment were filed on July 25, 2003. Pet. App. 22-41a.

Remand Motion Practice. On April 22, 2003, the Roches' counsel below filed a Motion to Remand the action to the Virginia state court (JA 225-27) based on jurisdictional facts adduced during merits discovery and based on his additional investigation. In the course of litigating the remand motion, the Roches' counsel below proffered evidence that:

- No fewer than nine Lincoln entities were on file with the Virginia State Corporation Commission (Exhibit 17 to Plaintiffs' Motion to Remand dated April 22, 2003, E.D. Va. Docket No. 142), but neither "Lincoln Property Company" nor "Lincoln Property Co." was authorized to transact business in Virginia (JA 234-35);

- EQR, the entity identified in Lincoln counsel's March 18, 2003 letter, was a Delaware limited partnership that was authorized to do business in Virginia (Exhibit 3 to Plaintiffs' Motion to Remand dated April 22, 2003, E.D. Va. Docket No. 142);
- Lincoln's website identified Mr. Franzen—and seven other Lincoln Vice Presidents and Senior Vice Presidents—as "Operating Partners" (JA 277-82); and
- Tax records on file with the Fairfax County, Virginia, Department of Tax Administration reflected that Mr. Franzen was a Virginia resident (JA 232; Exhibit 14 to Plaintiffs' Motion to Remand dated April 22, 2003, E.D. Va. Docket No. 142).

The Roches' counsel below argued that Lincoln "intentionally represented that 'Lincoln Property Co.' was a Texas Corporation" while "[i]n fact, defendant Lincoln Property Co., is not a Texas Corporation, but a Partnership with one of its partners residing in the Commonwealth of Virginia." JA 226. He further argued that "there is a lack of subject matter jurisdiction because the numerous entities of Lincoln Property Co., including the one that is managing Westfield Village and accepting the management payments are not Texas Corporations. In actuality, it is a partnership conducting business in the Commonwealth of Virginia." JA 228-29.

Evidence adduced by the Roches' counsel below also established that Lincoln was in effect a nominal party—that, because Lincoln was not authorized to do business in Virginia (*see* JA 234-35), there must have been other "Lincoln" entities operating out of Lincoln's Herndon, Virginia, offices and managing Westfield.

In opposition to the Motion to Remand, Lincoln submitted two declarations. In the first, Dan M. Jacks, Lincoln's General Counsel, identified five pertinent Lincoln entities: Lincoln, EQR, Lincoln Eastern Management Corporation ("LEMC"), Lincoln Placeholder Limited Partnership ("Placeholder") and ECW II. JA 238-40. The relationship between EQR, LEMC, Placeholder and ECW II, as described in the Jacks Declaration and accompanying documents, is set forth in the chart reprinted at Pet. App. 96a (which is largely accurate but omits that LEMC is also a limited partner in EQR (JA 251-52)). Notably, however, the Jacks Declaration:

- Does not identify the Lincoln entity or entities actually charged with managing Westfield;
- Is silent as to the citizenship, activities, and existence of ECW I; and
- Sheds no light on the reasons why Lincoln affirmatively represented to the Court (in its answer) and the public that it was itself the manager of Westfield.

The second declaration filed by Lincoln was executed by Mr. Franzen. The Franzen Declaration makes no reference at all to Lincoln. Mr. Franzen identifies himself as "a Vice President for Lincoln Eastern Management Corporation," and states: "In addition, I am referred to as a 'Partner' because I am a partner in several Texas limited partnerships that are involved in the acquisition and development of properties." JA 275. None of these is identified. Mr. Franzen declares that he has never been a partner in EQR, and adds: "In addition, I am not a partner in any entity that is responsible for managing or that receives management fees for Westfield Village apartments." *Id.*

Like Mr. Jacks' declaration, Mr. Franzen's declaration (1) did not identify the entity or entities responsible for managing Westfield; (2) is silent as to the citizenship, activities and existence of ECW I; and (3) sheds no light on the reasons why Lincoln affirmatively represented to the Court and public that it was itself the manager of Westfield.

In opposing remand, Petitioners adduced no evidence that Lincoln itself was involved directly in any aspect of managing the Westfield property.

Following extensive briefing, the District Court denied the Roches' Motion to Remand in a Memorandum Order dated August 11, 2003. Pet. App. 84-93a.

Fourth Circuit Decision. Reviewing *de novo*, the Court of Appeals reversed the District Court's denial of the remand motion, holding that "Defendants failed to carry their burden of proof with respect to their allegedly diverse citizenship." Pet. App. 2a. The Fourth Circuit observed that "it is firmly settled that a corporate parent and its subsidiaries may not manipulate federal diversity jurisdiction by litigating cases in the name of the other where the real party in interest is not diverse." Pet. App. 5a (citations omitted). The Court of Appeals stressed that:

> The citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism. It is based upon the principle that a primarily local controversy should be tried in the appropriate state forum and that nominal or formal parties, who do not have a significant interest in the outcome of the litigation, should not be able to use the federal courts.

Pet. App. 6a (citation omitted).

Noting that the District Court had erroneously reversed the burden of proof (Pet. App. 11a), the Fourth Circuit pointed out that Lincoln's 30(b)(6) witness (Senior Vice President Fred E. Chaney) described Lincoln as a partnership and that Lincoln executive John LeBeau described Franzen as a partner (*id.*). The Court of Appeals observed that only subsequently did Franzen "file a self-serving affidavit" claiming that he was a partner in other entities, none of which he identified. Pet. App. 11a. The Court of Appeals concluded that "the citizenship of the real parties in interest escapes us because of . . . mostly, Lincoln's failure to disclose all of the necessary jurisdictional facts. The negative inferences resulting from these obscurities . . . must be borne by Lincoln. . . ." Pet. App. 14a.

The jurisdictional issue was the subject of argument in the Fourth Circuit. Transcript of Oral Argument on May 5, 2005, at pp. 33-38, attached as Exhibit 2 to Lincoln's Reply in Support of its Motion for Relief from Mandate and, in the Alternative, to Present New Evidence, filed August 17, 2004, E.D. Va. Docket No. 192.[3] At argument, Lincoln's counsel represented that she was "very familiar with the record relating to Lincoln" and demonstrated that she was fully versed in the issue. *Id.* at 35-38. Following argument and before decision, Lincoln did not seek leave of court to submit any additional briefing or arguments concerning jurisdiction. Only after the Fourth Circuit decided against it did Lincoln seek to submit additional arguments on motions for rehearing and to stay issuance of the mandate pending their petition for certiorari. Appellees' Petition for Rehearing with Petition for Rehearing *En Banc*, filed July 14, 2004; Lincoln Property Co.'s and SWIB Investment Co.'s Motion to Stay Issuance of Mandate, filed July 30, 2004. These motions were denied. 4th Circuit Order on Petition for Rehearing and Rehearing *En Banc*, filed July 27, 2004; 4th Circuit Order filed August 4, 2004.

[3] As Petitioners' Brief accurately reflects (Pet. Br. 12 n.9), prior counsel to Respondents objected to Petitioners' inclusion in the Joint Appendix of this and other post-remand materials that were filed in the District Court. That objection is withdrawn.

On Remand in the District Court. Following remand to the District Court, Lincoln filed an Emergency Motion for Relief from Mandate and, in the Alternative, to Present New Evidence—effectively requesting that the District Court ignore the Fourth Circuit's mandate and decline to remand the case to the Virginia state court. Lincoln Property Co.'s Memorandum in Support of Emergency Motion for Relief from Mandate and, in the Alternative, to Present New Evidence, filed August 5, 2004, E.D. Va. Docket No. 186. In a tacit admission as to the inadequacy of the record at that point, Lincoln filed two additional factual declarations relating jurisdictional facts. *Id.* at Exhibits E and F. For the first time, in one of those declarations Lincoln asserted that: "No other entity affiliated with Lincoln (1) was involved in the management of Westfield Village or (2) received fees or revenue of any kind for the management of it." *Id.* at Exhibit E ¶ 8). Lincoln remained silent as to the citizenship, activities, and existence of ECW I, the signatory to the Roches' lease.

The District Court entered an order remanding the case to the Virginia state court (Minute Entry entered August 20, 2004, E.D. Va. Docket).

SUMMARY OF ARGUMENT

1. Petitioners' principal argument rests on a misreading of 28 U.S.C. § 1441(b). Petitioners urge that: "The Fourth Circuit's first holding [*i.e.*, its holding pertinent

to the First Question] conflicts with the plain language of the removal statute, which permits removal where each of the 'parties in interest *properly joined and served* as defendants' is diverse to each plaintiff. 28 U.S.C. § 1441(b)." Pet. Br. 1 (emphasis in original). Petitioners repeatedly quote this language from the last sentence of § 1441(b) (*e.g.*, Pet. Br. 7, 14, 15, 17, 23, 24), each time misconstruing it and misconceiving the statutory basis for removal jurisdiction in this diversity case.

The last sentence of § 1441(b) does not, by its terms, confer removal jurisdiction or have any relevance to this case. It simply states the Forum Defendant Rule, which prohibits an otherwise diverse defendant who is a citizen of the forum state from removing the action to federal court. Neither the Fourth Circuit nor the Roches suggested that a diverse local defendant had attempted removal in violation of the Forum Defendant Rule. Rather, the Fourth Circuit ruled, and the Roches contended, that there was no subject matter jurisdiction because diversity of citizenship had not been established by Petitioners. The question, properly conceived, arises under 28 U.S.C. § 1332(a)(1), not § 1441(b).

In a diversity action such as this, removal jurisdiction is conferred not by § 1441(b), but rather by § 1441(a). Section 1441(a) authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction. . . ." By its reference to "original jurisdiction," § 1441(a) incorporates, for present purposes, the complete diversity and amount in controversy requirements of § 1332(a)(1). Complete diversity was found wanting. The Forum Defendant Rule, an exception to removal which assumes the antecedent existence of complete diversity within § 1332(a)(1) (and, thus, § 1441(a)), is beside the point.

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2. Accordingly, the First Question presented for review entails two subsidiary questions, the first arising under § 1332 and the second under the removal statutes, particularly § 1447(c). The § 1332 question is: In evaluating whether a "matter in controversy . . . is between . . . citizens of different States," within § 1332(a)(1), must the court ever consider the citizenship of an unnamed real party to the controversy? This Court has answered this question in the affirmative many times, in many contexts. For example, an action against a state official or state entity is evaluated to determine if it is, in reality, an action against the state. Similarly, formal and nominal parties are disregarded and the citizenship of real parties to the controversy is assessed to determine if diversity exists. The same sort of "real party to the controversy" analysis is applied in several other jurisdictional contexts, as well.

Moreover, this Court has expressed specific concern that artificial entities not be permitted to use affiliates to manufacture otherwise non-existent diversity. The Fourth Circuit recognized that, by artful pleading and litigating, a non-public entity with a web of non-public affiliates, is uniquely situated to use the opacity of its organizational structure to manufacture the appearance of diversity by thrusting itself forward as the real party to the controversy, to the exclusion of undisclosed, non-diverse affiliates. When such an entity is not candid with the Court or counsel as to its direct involvement in the activities at issue, it has the power to trump the preference of a plaintiff for a state court venue—including, as here, a state court venue with potentially outcome-determinative differences in procedure and evidence.

The Court of Appeals refused to sanction disingenuous conduct by such a non-public entity—conduct that was designed to create diversity jurisdiction and is akin

to such pernicious, and disfavored, practices as fraudulent joinder to defeat jurisdiction, collusive joinder to create jurisdiction, and misalignment of parties to simulate jurisdiction. Where such a non-public entity does not clarify which of its affiliates are real parties to the controversy, despite ample opportunity to do so, it has not carried its burden of rebutting the presumption against federal jurisdiction, as the Fourth Circuit found. Placing a burden of candor on the non-public entity is scarcely a high price to pay for the right to invoke federal jurisdiction. "[I]t has never been the rule that federal courts, whose jurisdiction is created and limited by statute, acquire power by adverse possession." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (1989) (Kennedy, J., dissenting) (citation omitted).

3. The removal question before the Court is: Was remand required because Lincoln failed to carry its burden of rebutting the presumption against federal jurisdiction, *Kokkonen*, 511 U.S. at 377, such that, in the words of 28 U.S.C. § 1447(c), it "appear[ed] that the district court lack[ed] subject matter jurisdiction?" The Fourth Circuit concluded that remand was required where Petitioners had not resolved doubts concerning the nature of Lincoln and obscured proper parties defendant among Lincoln's network of non-public affiliates. The Court of Appeals did not, and it did not condone any attempt by the Roches to, "cast about for other potential defendants under the guise of identifying a jurisdictional flaw." Pet. Br. 15. Senior executives of Lincoln, in sworn testimony, and Lincoln itself in a variety of discovery documents, indicated that Lincoln was itself a partnership, not a corporation. Lincoln filed affidavits to take issue with its executives' testimony. The Court of Appeals did not credit the affidavits, and it found that they raised more questions than they answered. This conclusion that Lincoln failed to carry its burden of

proving that it is a foreign corporation is an independent ground for affirming.

Further, Lincoln itself belatedly identified one affiliate that was a proper party defendant when, in order to avoid disclosing Lincoln's own financial information, it offered that of an affiliated partnership (EQR) to satisfy a demand for punitive damages discovery. Even then, however, Lincoln failed to identify the party that managed the property at issue, and it never cured this omission until after the Fourth Circuit denied rehearing. Nor did Lincoln ever identify the citizenship, or describe the activities, of its affiliate ECW I, which signed the Roches' lease.

4. Petitioners seize on the Fourth Circuit's occasional use of the phrase "real party in interest" to argue that FED. R. CIV. P. 17 limits the analysis to the question whether plaintiffs, not defendants, are "real parties to the controversy" (*Carden*, 494 U.S. at 188 n.1). That argument is irreconcilable with *Navarro Savs. Ass'n v. Lee*, 446 U.S. 458, 463 n.9 (1980), *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954), numerous other decisions, and several established doctrines (*e.g.*, fraudulent joinder to defeat jurisdiction and disregarding formal or nominal parties). The decision below is consistent with the notion that the plaintiff is "master of the complaint" and may tactically select parties to affect jurisdiction. The Fourth Circuit's holding is animated by these policies, empowering plaintiffs to make informed choices by precluding non-public entities like Lincoln from engaging in dissimulation with respect to affiliates relevant to the plaintiff's forum decision.

5. The ruling below does not open the floodgates to post-judgment litigation any more than a defendant's concealment of material evidence does; both open the door to a post-judgment motion for relief, and both are

rare. The class of cases to which the Court of Appeals' ruling applies is small—it applies to non-public entities which have non-public affiliates and which are not candid as to their role, and that of their affiliates, in the transaction or occurrence at issue, in order to invoke and preserve a federal forum. The message is straightforward: Mischief breeds consequences.

ARGUMENT

I. THE FEDERAL COURTS ROUTINELY, AND NECESSARILY, EXAMINE THE CITIZENSHIP OF UNNAMED PARTIES IN DETERMINING DIVERSITY

Contrary to Petitioners' argument (Pet. Br. 12), governing statutes and this Court's precedents "sanction" what Petitioners characterize as "the court of appeals' wide-ranging *sua sponte* inquiry into the citizenship of entities not named in the plaintiff's complaint in determining whether diversity jurisdiction exists." *See* Pet. Br. 12. The propriety of removal in this case depended on whether there existed diversity of citizenship as defined in 28 U.S.C. § 1332, an inquiry that is nowhere restricted to entities "properly joined and served as defendants," in the words of § 1441(b).

A. The Forum Defendant Rule Does Not Define or Confer Diversity Jurisdiction

Petitioners argue that "[t]he court had no statutory basis for examining the citizenship of entities that had *not* been 'properly joined and served as defendants' in deciding whether removal under § 1441(b) was proper." Pet. Br. 17. This argument rests on Petitioners' misconstruction of the Forum Defendant Rule, from which Petitioners quote an excerpt. The Forum Defendant Rule,

however, provides only that, where diversity otherwise exists—*i.e.*, in "a civil action of which the district courts have original jurisdiction"—a defendant may not remove if it has been sued in its home forum:

> Any other such action [*i.e.*, any action other than one based on federal question jurisdiction] shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b). This sentence is, by its terms, a limitation on the right to remove where federal jurisdiction exists. It quite clearly does not confer jurisdiction. Petitioners' repeated quotation of the phrase "parties in interest properly joined and served as defendants" thus may be forensically skilled but it misses the jurisdictional point.

Removal jurisdiction is conferred in diversity actions not by § 1441(b) but rather by § 1441(a), which provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court <u>of which the district courts of the United States have original jurisdiction</u>, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (emphasis added).

"Original jurisdiction," within § 1441(a), is conferred in a diversity action by 28 U.S.C. § 1332(a)—in this case, by § 1332(a)(1), which confers "original jurisdiction of all civil actions where the matter in controversy . . . is between—(1) citizens of different States. . . ." *See, e.g., Syngenta Crop Prot., Inc. v. Henson*, 537

U.S. 28, 34 (2002) ("Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court"); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) ("The propriety of removal . . . depends on whether the case originally could have been filed in federal court."). Section 1441 does not expand the scope of diversity jurisdiction. On the contrary, this Court has consistently ruled that removal is confined to cases in which diversity of citizenship is complete[4] and the requisite amount in controversy is satisfied.[5]

Accordingly, the jurisdictional issue is not whether the ken of the courts below was restricted to "parties in interest properly joined and served as defendants" within the last sentence of § 1441(b). It was not. Section 1441(b) is irrelevant; § 1332(a)(1) is governing. The jurisdictional issue is: In evaluating whether a "matter in controversy . . . is between . . . citizens of different States," within § 1332(a)(1), must the court ever consider the citizenship of an unnamed real party to the controversy? The answer to this question is Yes.

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[4] *Cochran v. Montgomery County*, 199 U.S. 260, 272 (1905) (construing a predecessor to § 1441 which authorized removal by a non-resident defendant on grounds of "prejudice and local influence." Held, "the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the State in which the suit is pending and a citizen or citizens of another or other States. . . .").

[5] *In re Pennsylvania Co.*, 137 U.S. 451, 451-57 (1890) (construing a predecessor to § 1441 which authorized removal by a non-resident defendant on grounds of "prejudice and local influence." Held, "[t]he matter in dispute must exceed the sum or value of two thousand dollars in order to give the Circuit Court jurisdiction, as well in cases sought to be removed from a state court on account of prejudice or local influence. . . ."). The instant action does not implicate 28 U.S.C. § 1367 or the holding of this Court in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, ___ U.S. ___, 125 S. Ct. 2611 (2005).

B. The Inquiry into Diversity of Citizenship Focuses on Real Parties to the Controversy, and Is Not Limited to "Parties . . . Joined and Served"

In determining federal jurisdiction, this Court has consistently (1) applied the "real party to the controversy" test to both plaintiffs and defendants, and (2) rejected any suggestion that the courts are constrained in their review by the identity of the parties enumerated in the complaint. Indeed, § 1332 expressly contemplates that diversity may be destroyed by reference to the citizenship of unnamed parties. For example, § 1332(c)(1) provides that an insurer/defendant in a direct action is deemed to have the citizenship of its unnamed insured, and § 1332(c)(2) provides that the legal representative of an estate is deemed to have the citizenship of the decedent.

"Early in its history, this Court established that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy. . . ." *Navarro*, 446 U.S. at 460-61, *citing McNutt v. Bland*, 2 How. (43 U.S.) 9, 15 (1844); *Marshall v. Baltimore & Ohio R.R. Co.*, 16 How. (57 U.S.) 314, 328-29 (1854); *Coal Co. v. Blatchford*, 11 Wall. (78 U.S.) 172, 177 (1871).

Consequently, "in controversies between citizens of different States, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction. . . ." *Rice v Houston*, 13 Wall. (80 U.S.) 66 (1871). *Cf. Carden*, 494 U.S. at 188 n.1 ("The question . . . which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, [is] a question that will generally be answered by application of the 'real party to the controversy' test.").

In the decision below, the Court of Appeals interchangeably used the phrases "real and substantial parties to the controversy" (Pet. App. 4a), "real parties to the controversy" (Pet. App. 4a, 14a n.12), "real and substantial party in interest" (Pet. App. 5a, 6a, 7a n.5, 15a, 16a), and "real party in interest" (Pet. App. 5a, 6a & n.4, 9a, 10a, 14a & nn.12-13, 16a), often in close proximity to one another. Petitioners seize on the phrase "real party in interest" to argue that FED. R. CIV. P. 17 limits any proper "real party in interest" analysis to real parties plaintiff, not (as here) defendants. Pet. Br. 25-26. This is incorrect.

> There is a 'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases.

Navarro, 446 U.S. at 463 n.9 (1980) (citations omitted).[6] *See also Lumbermen's Mut. Cas. Co.*, 348 U.S. 48, a direct action against an insurer that was decided after the adoption of FED. R. CIV. P. 17 and before enactment of § 1332(c)(1). A Louisiana statute authorized a direct action against the insurer alone, and the plaintiff made the strategic choice to pursue the action against the insurer only. This Court ruled that the insurer was "not merely a nominal defendant but is the real party in interest here." *Id.* at 51. *Accord* 15 MOORE'S FEDERAL

[6] As observed in a law review note cited by *Navarro* for this proposition, the "real party in interest" analysis applies to defendants as well as plaintiffs: "If a court finds that a party *contesting* a suit is merely a nominal party, then it looks to a more appropriate party for diversity purposes." Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEX. L. REV. 243, 250 (1978) (emphasis added).

PRACTICE § 102.15 at 102-27 (3d ed. 2005) ("A-real-party-in-interest defendant is one who, according to applicable substantive law, has the duty sought to be enforced or enjoined.").

Petitioners' argument that the real-party-in-interest "analysis does not assess the citizenship of putative defendants not named in the complaint" (Pet. Br. 25-26) is irreconcilable with, among others, this Court's decision in *State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1929). The plaintiff construction company in *State Highway Comm'n* sued the Wyoming State Highway Commission for breach of contract. This Court found that the "real party in interest" defendant was the unnamed State of Wyoming, which was not a citizen. As a consequence, the Court held that "the petition showed no diversity of citizenship between real parties in interest," under the then-operative diversity statute, 28 U.S.C. § 41. *Id.* at 199-200.

The Court examines the interest of unnamed "real parties to the controversy" to decide many jurisdictional issues. For example, exercise of the Court's original jurisdiction over controversies between two States often requires consideration of whether the real party to the controversy is the state or its unnamed citizenry. *See, e.g., Arkansas v. Texas*, 346 U.S. 368, 371 (1953) ("We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest."); *Kansas v. Colorado*, 533 U.S. 1, 7-9 (2001) ("We have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens.").

In cases implicating the Eleventh Amendment, the Court looks beyond the named defendant to determine whether "the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from

suit even though individual officials are nominal defendants." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *See also, e.g., Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 277-78 (1997) ("It is not 'conclusive of the principal question in this case, that the [State] is not named as a party defendant. Whether it is the actual party . . . must be determined by a consideration of the nature of the case as presented on the whole record.'"); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 167-69 (1909) ("Though not nominally a party to the record, it [the State] is the real and only party in interest, . . . the real party to the controversy, [and] the real party against which relief is sought by the suit. . . .").

Similarly, in interpreting the scope of the judicial power conferred by Article III, Section 2, this Court has looked beyond the named defendant to determine whether the United States is the real party to the controversy. *Minnesota v. Hitchcock*, 185 U.S. 373, 387 (1902) ("The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.").

As these examples suggest, the answer to the First Question presented—"Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a 'real party in interest' to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b)"—is affirmative.

Moreover, the inquiry made by the Fourth Circuit is consistent with this Court's disapproval of the manipulation of corporate affiliates to manufacture diversity and is analogous to many other juridical doctrines adopted by this Court to enforce the limited scope of federal diversity jurisdiction. In *Lehigh Mining & Mfg. Co.*, 160 U.S. 327, the shareholders of a Virginia corporation set up a Pennsylvania corporation (with identical share ownership) for the sole purpose of assigning to it title to property so that the Pennsylvania corporation could commence a federal action relating to the property. *Id.* at 330-31. This was deemed collusive and barred under the predecessor statute to 28 U.S.C. § 1359 (Act of March 3, 1875, ch. 137, 18 Stat. 470): "[W]hen the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record. . . ." 160 U.S. at 336-37 (citations omitted). *See also Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 211 U.S. 293, 302-03 (1908) (holding that a parent company cannot create federal diversity by assigning its claim to a subsidiary, again under the Act of March 3, 1875).

The Fourth Circuit was similarly concerned with the collusive manufacture of federal jurisdiction—not through the creation of a corporate affiliate but through the concealment of a non-diverse affiliate's (or affiliates') existence. Lincoln knew that the Roches preferred a state court venue—the action had been commenced there. Lincoln represented in its answer that it was itself the manager of the Westfield property, but it never offered any evidence that it in fact had anything to do with the management of Westfield. Lincoln represented in its answer that it conducted its management of Westfield through its "regional offices"—but it carefully omitted that these "offices" comprised one or more distinct entities. Lincoln was in fact a nominal party—but it had the virtue of being diverse and being the party that held itself out to the public as the manager of Westfield. Lincoln's artful pleading and litigating were designed to create and preserve federal jurisdiction by diverting attention concerning corporate citizenship to itself, rather than affiliated entities actually acting in Virginia.

This behavior was properly proscribed. It is the cognate of equally pernicious, and prohibited, practices such as:

- Fraudulent joinder to defeat jurisdiction. *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185-86 (1907):

  > [T]he Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.[7]

- Improper or collusive joinder to create jurisdiction. 28 U.S.C. § 1359; *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 829 (1969) ("Such 'manufacture of Federal jurisdiction' was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.").

- Misalignment of parties to create federal jurisdiction. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941) (citation omitted):

  > Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to "look beyond the pleadings and arrange the parties according to their sides in the dispute."

[7] *Accord Wormley v. Wormley*, 8 Wheat. (21 U.S.) 421, 451 (1823) (Story, J.); *Lee v. Lehigh Valley Coal Co.*, 267 U.S. 542, 543 (1925) (Holmes, J.).

In this case, the Fourth Circuit recognized that, in dealing with a non-public entity that operates a web of affiliates under a common name, a "real party to the controversy" may be an affiliate that is hidden from view in order to manufacture federal jurisdiction. The Fourth Circuit recognized that it is no great burden to require such a non-public entity, when invoking federal jurisdiction, to disclose its relevant affiliates and to refrain from disingenuous conduct designed to obfuscate their existence. The Court of Appeals reasonably concluded that a party engaged in jurisdictional gamesmanship of this sort failed to carry its burden of rebutting the presumption against federal jurisdiction.

II. THE RULING BELOW WAS AN APPROPRIATE EXERCISE OF THE COURT'S AUTHORITY TO SAFEGUARD THE LIMITS OF ITS JURISDICTION

Petitioners begin their argument by assuming the conclusion: "The statutory requisites were readily satisfied . . . Lincoln was a Texas corporation with its principal place of business in Dallas. . . . " Pet. Br. 14. Senior executives of Lincoln, in sworn testimony, and Lincoln itself in a variety of discovery documents, indicated quite the contrary—that Lincoln was in fact a partnership. *See* pp. 6-8, *supra*. Lincoln filed what the Fourth Circuit aptly characterized in one instance (Pet. App. 11a) as a "self-serving" affidavit to take issue with its executives' testimony. The Court of Appeals did not credit the affidavits, consistent with the practice in the Fourth and other Circuits rejecting a party's contradiction of his or her prior testimony without adequate explanation—a circumstance that arises with some frequency in the summary judgment context.[8] The Fourth

[8] *See, e.g., Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999); *Colantuoni v. Alfred Calcagni & Sons,*

Circuit's conclusion that Lincoln did not carry its burden of proof that it was a foreign corporation is an independent ground for affirming the decision below.

The Fourth Circuit did not, and it did not condone any attempt by the Roches to, "cast about for other potential defendants in the guise of identifying a jurisdictional flaw," as Petitioners suggest. Pet. Br. 15. The flaw was raised by the testimony of senior officers of Lincoln and by Lincoln itself in discovery responses, including its identification of EQR as the entity whose financials were germane for purposes of punitive damages discovery. The Court of Appeals was bound to resolve the jurisdictional question. *Carden*, 494 U.S. at 195 ("Since diversity of citizenship is always a jurisdictional requirement, the Court is always 'called upon to decide' it.") (quoting *Great S. Fire Proof Hotel Co. v. James*, 177 U.S. 449, 453 (1900)).

Nor was it improper for the Court of Appeals to place the burden of establishing jurisdiction on Petitioners, as the parties who invoked it:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen, 511 U.S. at 377 (citations omitted). *Accord McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178

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44 F.3d 1, 5 (1st Cir. 1994); *Rubens v. Mason*, 387 F.3d 183, 192 (2d Cir. 2004); *Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004); *Graham v. Am. Cyanamid Co.*, 350 F.3d 496, 509 (6th Cir. 2003); *Ineichen v. Ameritech*, 410 F.3d 956, 963 (7th Cir. 2005); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 (11th Cir. 2003).

(1936). "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

Petitioners' suggestion that the Court of Appeals' examination of the citizenship of unnamed parties was an unwarranted frolic seriously mischaracterizes the record and the nature of the Court's obligation in the face of it. Lincoln, a non-public company, occupies an undefined place in an amorphous network of undisclosed affiliates, through which it concededly transacts business. On the basis of Lincoln's representations to the public, the Roches named what they thought was the Lincoln entity operating out of Virginia and managing their Virginia apartment. Lincoln so affirmed in its answer. The sworn testimony and discovery responses of Lincoln and its officers did not quell but rather fueled wholly reasonable concern that either Lincoln or an affiliated "real party to the controversy" was non-diverse. That undercut any need or justification for a federal forum:

> [T]he purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.

Exxon Mobil Corp., 125 S. Ct. at 2618 (citations omitted). There was no error in the Fourth Circuit's resolution of that issue.

The American Law Institute, in its STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969), articulated the federalism concerns that properly guide judicial resolution of diversity jurisdiction issues like this one:

> [A]ccess to the federal courts because of the diversity of citizenship of the parties should be permitted only upon a showing of strong reasons therefor and only to the extent that these reasons justify. This premise is grounded upon the political axiom, advanced by Hamilton in justification of the federal judicial power, that judicial and legislative authority should be coextensive. So long as federal courts continue to decide cases arising under state law without the possibility of state review, the state's judicial power is less extensive than its legislative power; this is an undesirable interference with state autonomy. *** The diversion of state law litigation to federal tribunals that is fostered by the availability of diversity jurisdiction retards the formation and development of state law; to the extent that unsettled questions of state law are thus kept away from the state courts—and that can be, and at times has been, substantial and important—authoritative resolution of these questions is at least delayed and at times precluded.

Id. at 99. The decision of the Fourth Circuit reflects an appropriate balancing of these concerns when a court is confronted with a non-public entity that maintains a private network of affiliates and seeks to use its organizational opacity as a device to manufacture diversity jurisdiction over a local controversy. Candor to the tribunal is not too weighty a burden to impose on such an entity when it is invoking federal jurisdiction.

III. THE DECISION BELOW IS CONSONANT WITH THE TEACHINGS OF THIS COURT AND THE FEDERAL RULES OF CIVIL PROCEDURE

A. The Fourth Circuit Decision Is Consistent with Policy that Plaintiff Is "Master of the Complaint" and May Select Defendants Tactically to Affect Diversity

There is no merit to Petitioners' argument that the ruling below is dissonant with either (1) the policy that the plaintiff is "master of the complaint," or (2) a plaintiff's privilege to voluntarily dismiss a non-diverse party in order to preserve diversity jurisdiction. *See, e.g.*, Pet. Br. 17 ("The choice of respondents, as masters of their complaint, not to sue any non-diverse defendants is dispositive."); Pet. Br. 21 ("[A] plaintiff can dismiss voluntarily a non-diverse party to create diversity. If a plaintiff has license to create diversity jurisdiction in that manner, then it makes no sense to defeat a defendant's removal based on an entity the plaintiff has not sued."). The Fourth Circuit's holding in fact animates these policies by empowering plaintiffs to make informed choices and by precluding non-public entities like Lincoln from engaging in obfuscation with respect to affiliates relevant to the plaintiff's forum decision. Petitioners' argument appears to be that these policies, granting plaintiff the power to name or omit defendants, concomitantly grant named defendants the power to determine jurisdiction by hiding proper parties defendant and thus effectively dictating plaintiffs' choices. This argument has several flaws.

First, Petitioners' "master of the complaint" argument is founded on the false premise that plaintiffs are in an informed position and thus able to effectuate their preferences. In this case, the opacity of Lincoln's business

structure, combined with Lincoln's lack of candor in its answer, its inconsistent discovery responses, and its insistence on playing it close to the vest when called upon to clarify jurisdictional facts, thwarted any informed, let alone tactical, decision to name or omit any Lincoln affiliate. The Roches wanted to be in Virginia state court. They thought they were suing the Lincoln entity operating out of Virginia and managing their Virginia apartment. They directed service to Lincoln t/a (trading as) ECW I. They effected service through a Virginia registered agent at a Virginia address. The authorities cited by Petitioners for their "master of the complaint" argument involve conscious choices made by plaintiffs informed by knowledge of the jurisdictional facts—and are inapposite due to Lincoln's conduct below.

In *Lumbermen's Mut. Cas. Co.*, 348 U.S. 48, for example, the plaintiff had taken advantage of Louisiana's direct action statute, which created a separate cause of action against the insurer, with elements and defenses different from those assertable in an action against the insured party. The plaintiff was given the statutory choice of suing the insurer in lieu of, or in addition to, the insured. All potential defendants and their citizenships were known, and plaintiffs made a strategic choice to sue one and not another. There is no suggestion that, as here, the existence or identity of any potential defendant was difficult to ascertain, let alone, as here, deliberately obscured.[9]

[9] *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), involved an insurance company that had, for various tactical reasons, declined to name its insured. *Homes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002), *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), and *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), all address (in some cases only elliptically) a plaintiff's decision to include or characterize allegations in a way that will or will not state a federal question. *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171 (9th Cir. 1979), undermines Petitioners' argument in a way that is particularly apt. In *Simpson*, an employment discrimination case, the defendant effected removal after informing plaintiff that a foreign parent, rather than its non-diverse subsidiary, was actually plaintiff's employer. After the plaintiff obtained dismissal of affirmative defenses in federal court, the defendant sought to challenge diversity after purportedly discovering that a second non-diverse subsidiary was plaintiff's employer. The court refused to allow the defendant to take advantage of its ability to control jurisdictional information.

Second, as reflected in the discussion in Part I(B), *supra*, there have always existed numerous exceptions to the "master of the complaint" rubric when diversity jurisdiction is at issue. Thus, this Court realigns parties according to their interests in the dispute, regardless of how the plaintiff labels them. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. at 69. The Court disregards formal or nominal parties. *Wood v. Davis*, 18 How. (59 U.S.) 467, 469-70 (1856); *Walden v. Skinner*, 101 U.S. 577, 588-89 (1880). Similarly, in federal question cases, the Court applies the artful pleading exception to the well-pleaded complaint rule. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983) ("it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint"). Fairly considered, the Fourth Circuit applied the equivalent of an artful pleading and artful litigating exception, framed in terms of Petitioners' failure to carry their burden of proof.

Third, the Fourth Circuit's decision is consistent with the teachings of *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green*, 490 U.S. 826. *Caterpillar* concerned a technical removal flaw; the jurisdictional spoiler had been removed by the time of trial and judg-

ment. In the instant case, the Fourth Circuit held that no jurisdiction ever vested in the federal courts because defendants failed to carry their burden of proving diversity. One may agree or disagree with the Fourth Circuit's conclusion, but in no respect does this case concern a technical removal flaw that was cured by the time of judgment. Petitioners rely on the statement in *Caterpillar* that, "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." 519 U.S. at 75 (quoted at Pet. Br. 21). However, as this Court emphasized in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004), this statement "related not to cure of the jurisdictional defect, but to cure of a statutory defect, namely failure to comply with the requirement of the removal statute, 28 U.S.C. § 1441(a), that there be complete diversity at the time of removal." As in *Grupo Dataflux*, the jurisdictional defect in the instant case was not cured by the time of judgment, rendering *Caterpillar* inapt.

Newman-Green, which was decided on summary judgment, ruled that in certain circumstances the Courts of Appeals, like District Courts, have the authority to dismiss a dispensable nondiverse party to eliminate a jurisdictional defect. 490 U.S. at 837. That the courts have such powers does not address whether a non-public entity like Lincoln may invoke the jurisdiction of the federal courts by cloaking in secrecy the activities of affiliated entities to prevent the plaintiffs from naming a non-diverse defendant. Moreover, *Newman-Green* observed that the controversy before it would, if dismissed, be re-filed in federal court after dismissal and "proceed to a preordained judgment." 490 U.S. at 837. This case will proceed in state court, if the Fourth Circuit decision is affirmed, and stark differences in summary judgment practice and the law of expert evidence

will certainly not lead to a pre-ordained judgment, whatever the outcome. Even if this were not the case, however, the absence of jurisdiction should lead to remand. As it did in *Grupo Dataflux*, 541 U.S. at 597, this Court should reject the argument that jurisdiction be upheld despite a jurisdictional flaw because dismissal would lead to re-litigation and a waste judicial and legal resources. If the parties choose to continue to litigate rather than to settle, "the 'waste' will not be great. Having been through three years [here, one year] of discovery and pretrial motions in the current case, the parties would most likely proceed promptly to trial." *Id.* at 581.

B. The Ruling Below Did Not Implicate Rule 19, Much Less "Abrogate" It

Petitioners argue that the ruling below was "tantamount" to "a ruling that EQR was an indispensable party, without whose presence the case could not proceed," and that such "Rule 19 analysis should be completely unnecessary to a proper decision whether removal is appropriate. . . ." Pet. Br. 28, 30. In fact, the Court of Appeals was explicit that it was unable to identify the real parties to the controversy. "From the record, it appears that the real and substantial party in interest is the Virginia subsidiary, *be it a partnership, corporation or otherwise*, rather than the Texas parent." Pet. App. 16a (emphasis added). The Court concluded that the record created by Petitioners was too confused and incomplete to dispel the appearance that the district court lacks subject matter jurisdiction, the condition under which dismissal is mandated by 28 U.S.C. § 1447(c).

Petitioners focus on, and in brackets add to, the following sentence from the opinion below: "To be accu-

rate, both the Texas parent and the Virginia sub-'partnership' should be parties to the instant action." Pet. App. 16a. Petitioners choose EQR from among multiple entities examined by the Court of Appeals as the entity to interlineate following the word "sub-'partnership' " in the bracketed "[*i.e.*, EQR]." Pet. Br. 28. Petitioners could as easily have inserted the name "Lincoln Property Company ECW, Inc." (ECW I) to which they devote a footnote conceding that "Lincoln Property Company ECW, Inc." was both the signatory to the lease and a nominal defendant until Lincoln chose to answer on behalf of itself rather than that entity. Pet. Br. 33 n.27. Lincoln carefully omitted all mention of ECW I from its answer, its Notices of Removal, and from every declaration it filed on the Motion to Remand, although the brief of amicus Real Estate Roundtable ("RER") suggests that ECW I is likely to be a Virginia special purpose entity dedicated to the Westfield property at issue: "The parent entity is likely to setup a separate business entity—for example, a partnership or limited liability company—for each of the individual properties." *Id.* at 8. No such entity, be it ECW I or otherwise, was ever identified. The principal place of business of this entity is likely to be Virginia.

Rule 19 analysis played no part, explicitly or implicitly, in the Court of Appeals' conclusion that Petitioners had supplied insufficient jurisdictional facts to support federal jurisdiction. The jurisdictional question before the Court is antecedent to any Rule 19 issue. Unless jurisdiction exists, the Federal Rules of Civil Procedure are not implicated.

C. The Ruling Below Does Not Create Uncertainty

Petitioners argue that:

> The Fourth Circuit's rule imposes a burden on a defendant to prove a negative—that there is no other possible non-named defendant who might have an interest in the lawsuit and that, if there are, those non-named putative defendants also are completely diverse from the plaintiffs. Such open-ended and standardless requirements should not be engrafted onto removal determinations, which occur thousands of times a year in the federal courts.

Pet. Br. 37-38.

There are at least four flaws in this argument.

First, the class of cases to which the Court of Appeals' ruling applies is small—it applies to non-public entities which have non-public affiliates and which are not candid as to their role, and that of their affiliates, in the transaction or occurrence at issue, in order to invoke and preserve a federal forum.

Second, the "real party to the controversy" test is already engrained in federal jurisprudence. A defendant already must prove that it is not a formal or nominal party, that it is properly before the Court. The defendant need not prove a negative—it must prove a positive: That it belongs before the Court. That is an element of proof that Lincoln never satisfied as to itself, and which it declined to clarify as to its affiliates until after the case was remanded by the Fourth Circuit to the District Court. Further, the removing defendant must disclose affiliates involved in the transaction or occurrence at issue.

Third, the burden of demonstrating that a non-public entity's pertinent affiliates are diverse is no heavier than the burden routinely imposed by *Carden* on limited partnerships—entities that can be quite complex and far-flung (indeed, publicly traded). The burdensome aspect of Lincoln's participation in motion practice below did not arise from any inherent difficulty in determining the existence of Virginia affiliates or their interest in this litigation, but rather arose out of Lincoln's artfully avoiding disclosure of non-public information solely within its control that may have destroyed, or permitted the plaintiff to destroy, diversity.

Fourth, any ensuing inquiry will not be "standardless." Determinations of citizenship are based on bright lines, as this Court recently reiterated in *Grupo Dataflux*, 541 U.S. at 582, and none of those bright lines is called into question here. The citizenship and activities of Lincoln's affiliates involved in the transactions and occurrences set forth in the Roches' Second Amended Complaint are objective facts. If the jurisdictional issue concerns whether there is an unnamed, non-diverse, real party to the controversy, and, unlike here, the court is in fact able to identify that party, then 28 U.S.C. § 1447(e), and FED. R. CIV. P. 19 and 20, supply standards. Indeed, it is not an unfair reading of the Court of Appeals' decision that the Court effectively did a § 1447(e) analysis, but was prevented from joining the additional, unidentifiable Lincoln affiliate due to Lincoln's jurisdictional gamesmanship and effectively reached the same result.

Petitioners' hyperbole aside, this issue will not arise "thousands of times a year," but only in the rare case, where, as here, the court is presented with evidence—in this case from the defendant itself—calling subject matter jurisdiction into question. When that occurs, proceedings to resolve that issue are essential, and will not

clog the federal courts, as Petitioners predict, but rather will have the salutary effect of limiting the reach of federal courts in areas where federal questions are not implicated.[10]

IV. THE COURT OF APPEALS DID NOT DETERMINE THE CITIZENSHIP OF ANY LIMITED PARTNERSHIP, MUCH LESS APPLY A NEW "NEXUS" TEST

The Second Question presented by Petitioners rests on their mischaracterization of the opinion below. The Fourth Circuit did not rule that a limited partnership's

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[10] We would be remiss were we not to point out that the conflict among the Circuits identified by the Petitioners is largely a conflict concerning the proper method for determining the citizenship of Lloyd's of London, and the resolution of this case is unlikely to resolve that conflict, which turns on the unique structure of Lloyd's (is the citizenship of a syndicate dispositive?) and the contractual relations among the various "Names" and underwriters (does it matter whether a lead underwriter sues or is sued in a representative capacity or in its own name?). *Compare Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 317-19 (7th Cir. 1998) (citizenship of syndicates essential; to be determined by citizenship of each Name); *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 43 (6th Cir. 1994) (citizenship of syndicates and Names irrelevant; active underwriters may be sued as agents for undisclosed principals); *E.R. Squibb & Sons v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 939-40 (2d Cir. 1998) (agreeing with Seventh Circuit that, if lead underwriter sues or is sued in a representative capacity, citizenship of all Names must be considered, but also holding that, if only one Name sues or is sued, the citizenship of other Names may be disregarded, even if all are contractually bound by the result); *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 864-66 (5th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004) (following *Squibb*); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 221-23 (3d Cir. 1999) (action against underwriter in both representative and individual capacity deemed to be in reality against the underwriter only, given the absence of class certification, such that only the underwriter's citizenship must be considered).

citizenship for diversity purposes is determined by its "very close nexus" with the state, but rather that the existence of this nexus was further evidence of Lincoln's obfuscation.

Petitioners argue that "limited partnership EQR's 'nexus' of activities to Virginia is irrelevant to determining its citizenship for diversity jurisdiction." Pet. Br. 41. The Court of Appeals never ruled on the citizenship of EQR or any other limited partnership. Describing "ample record evidence" of the connection to Virginia—including, *inter alia*, "the property at issue . . . the mold abatement services . . . several rental properties [maintained by Lincoln, and] . . . correspondence and communication related to the controversy"—the Court concluded that "[a]ll of this militates in favor of finding that the real and substantial party in interest is the Lincoln entity (partnership or not); probably EQR/Lincoln Limited Partnership, which 'is an authorized and registered partnership in Virginia.' " Pet. App. 15a. For its statement that EQR was a "registered partnership *in Virginia*" (*id.*; emphasis in original), the Court cited certificates in the record from the Virginia State Corporation Commission. On the following page of its opinion (Pet. App. 16a), again reviewing indications that some unidentified Virginia entity was the real party to the controversy, the Court subsumed all those indicia under a comment on "a very close nexus with the Commonwealth."

None of the foregoing constituted (1) a determination—even a statement—that EQR was a citizen of Virginia; (2) a determination of the citizenship of any limited partnership, or (3) reliance upon a "nexus" test to determine the citizenship of any entity whatsoever.

The Second Question presented by Petitioners is not fairly raised by the Fourth Circuit's opinion and is not in dispute.

V. NO DUE PROCESS CONCERNS ARE IMPLICATED

In their post-remand submissions to the District Court, Petitioners asserted that they intended to seek certiorari on the following question: "First, whether a court of appeals may decide dispositive issues raised *sua sponte*, without giving the parties either notice or an opportunity to be heard." (Lincoln Property Co.'s Motion to Stay Issuance of Mandate, filed July 30, 2004 at p. 2). Tellingly, that had been an issue raised by Petitioners in their Petition for Rehearing with Petition for Rehearing *En Banc*. (Appellees' Petition for Rehearing with Petition for Rehearing *En Banc* filed July 14, 2004, at pp. 12-14). It was not, however, an issue on which Petitioners sought certiorari or on which certiorari was granted. It is not properly before the Court.

In all events, Lincoln was fully accorded due process—it received ample notice and several opportunities to be heard. The diversity jurisdiction issue was extensively briefed in the District Court. JA 13-15. It was argued in the Court of Appeals by counsel for Lincoln who represented to that Court that she was "very familiar" with the issue, and who then proceeded to demonstrate that by arguing the issue thoroughly. Transcript of Oral Argument on May 5, 2005, at pp. 35-38, attached as Exhibit 2 to Lincoln's Reply in Support of its Motion for Relief from Mandate and, in the Alternative, to Present New Evidence, E.D. Va. Docket No. 192. Lincoln did not seek leave of court to submit additional briefing or argument on the issue after argument in the Fourth Circuit. Lincoln did submit additional briefing on its Peti-

tion for Rehearing with Petition for Rehearing *En Banc*. Appellees' Petition for Rehearing with Petition for Rehearing *En Banc*, filed July 14, 2004. There was no failure of due process, as a matter of fact.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

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28 U.S.C.A. § 1359 (2005) – Parties Collusively Joined or Made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Act of March 3, 1875, ch. 137, 18 Stat. 470 – An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate The Removal of Causes From State Courts, and For Other Purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee unless a

suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

SEC. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

SEC. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried and

before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do

claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury.

SEC. 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SEC. 5. That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or col-

lusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

SEC. 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

SEC. 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court, and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action or proceeding

was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court.

And the circuit court to which any cause; shall be removable under this act shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit-court shall require the other party to plead, and said action, or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

SEC. 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not

be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State; *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order

setting aside the Judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme court, as provided in case of the death of a party after appeal taken or writ of error brought.

SEC. 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved, March 3, 1875.

Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (codified as 28 U.S.C. § 41)

Original Jurisdiction

The district courts shall have original jurisdiction as follows:

(1) United States as plaintiff; civil suits at common law or in equity.

First. Of all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different State; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. or (b) Is between citizens of a State and foreign States, citizens or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the case mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative

board or commission of a State, or any rate-making body of a political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

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Federal Rule of Civil Procedure 20 – Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

***

Federal Rule of Civil Procedure 32 – Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

***

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

***

Federal Rule of Evidence 801 – Definitions

The following definitions apply under this article:

***

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—

***

(2) **Admission by Party-Opponent.** The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Va. Code Ann. § 8.01-420 (2005) – Depositions as Basis for Motion for Summary Judgment or to Strike Evidence

No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used.

Rules of the Supreme Court of the State of Virgina
Rule 3:18 – Summary Judgment.

Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such deposition may be so used.

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No. 04-712

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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August 24, 2005

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In any lawsuit, multiple persons or entities – *if* joined as defendants – could become parties whose citizenship would be relevant to whether complete diversity exists. Such putative, unnamed defendants might include affiliates of a named corporation or partnership; entities the named defendant contracted with, directed, or authorized to perform the acts at issue; and others that might, for myriad reasons, face potential joint and several liability. The lower court's *sua sponte* ruling impermissibly turned that commonplace truth into an unprecedented legal rule of indeterminate scope, requiring dismissal when one putative, unnamed defendant is potentially non-diverse. The court also departed from established law by basing a partnership's citizenship on its "nexus" with the plaintiff's state.

Both holdings create unworkable rules and should be reversed. As masters of their complaint, respondents should be held to their strategic choices. While respondents now accuse Lincoln of hiding the existence of its affiliates, their own pleadings indisputably show that they made tactical decisions about which Lincoln entity they wanted to sue. In their original, amended, and second amended complaints, they themselves noted Lincoln's use of affiliates – and they even went so far in their second amended complaint as to drop any mention of Lincoln Property Company ECW, Inc. – the entity they now claim is crucial and diversity-destroying. Respondents never sought to join any Lincoln affiliate as a defendant, and they did not even pursue discovery geared toward learning more about those affiliates. Those strategic decisions cannot now be the reason for destroying diversity based on putative, unnamed defendants that respondents chose not to sue.

The court's second holding on the "nexus" of a partnership is ungrounded in any decision of this Court and should be rejected. Respondents make no effort to defend the Fourth Circuit's rule on its merits, and their efforts to argue that the court below did not concoct a new rule cannot be squared with the court's opinion and holding.

I. THE CITIZENSHIP OF A LINCOLN AFFILIATE THAT PLAINTIFFS DID NOT SUE IS IRRELEVANT TO DIVERSITY JURISDICTION

A. The Text Of 28 U.S.C. §§ 1332 And 1441 Confirms That Removal Was Proper Here

1. The texts of the statutes governing original diversity jurisdiction, § 1332, and removal of a diversity action to federal court, § 1441, preclude searching outside the complaint for jurisdictional spoilers that plaintiffs failed to join as defendants to their civil action. *See* Pet. Br. 14-15.

Section 1332(a)(1) provides for original jurisdiction of all "civil actions" that are "between . . . citizens of different states." By long understanding, a "civil action" is a "proceeding in a court of justice in which one party, known as the 'plaintiff,' demands against another party, known as the 'defendant,' the enforcement or protection of a private right." *Black's Law Dictionary* 332 (3d ed. 1933) ("A 'civil action' implies adversary parties and an issue.").[1] The Federal Rules of Civil Procedure codify that understanding by setting forth in Rule 3 that a "civil action is commenced by filing a complaint with the court," and in Rule 4(a) that the "summons" shall "identify the court and the parties [and] be directed to the defendant." The only parties defendant so named in the complaint and the

[1] *See also Black's Law Dictionary* at 41 (defining "action" as "[t]he legal and formal demand of one's right from another person or party made and insisted upon in a court of justice"); *Bouvier's Law Dictionary* 41 (1928 & 1946) ("The vital idea of an action is a proceeding on the part of one person as actor against another."). Until 1948, the diversity statute referred to "suits of a civil nature." Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 78. The word "suit" as used in the 1789 Judiciary Act means "a right [that] is litigated *between parties* in a court of justice." *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) (Marshall, C.J.) (emphasis added); *cf. Hardy v. Johnson*, 68 U.S. (1 Wall.) 371, 374 (1863) ("The names of the real claimants and defendants must appear in the pleadings."). In 1948, the "[w]ords 'all civil actions' were substituted for 'all suits of a civil nature, at common law or in equity' in order to conform to Rule 2 of the Federal Rules of Civil Procedure." 28 U.S.C. § 1332, 1948 Revision Note.

summons here – and therefore the parties that constitute defendants' side of this "civil action" – are Lincoln and SWIB. *See* Pet. Br. 14-15. Plainly, a person *not* named as a defendant cannot be one of the citizens "between" whom a civil action exists under § 1332(a)(1).

Section 1441(a) then provides for removal of any "civil action" in which the courts have original jurisdiction, and § 1441(b) echoes the § 1332 diversity requirement that a suit be between citizens of different states by permitting removal only by "parties in interest properly joined and served." Thus, neither § 1332 nor § 1441 permits plaintiffs to challenge diversity based on the citizenship of entities they failed to name as defendants in the "civil action" they initiated. And § 1441(b) makes clear that removal can be effectuated only by "parties in interest properly joined and served as defendants."

2. Respondents take issue with that textual reading through a series of unpersuasive deflections.

a. Respondents point (Br. 21) to exceptions provided by Congress to the foregoing general rule. Section 1332(c)(1) treats the citizenship of an insurer in certain cases to be the same as its unnamed insured, and § 1332(c)(2) deems the citizenship of the representative of a decedent's estate, an infant, or an incompetent to be the same as the unnamed, represented person. While not explicit, respondents appear to suggest that lower courts can make up additional rules in other contexts attributing to a named party the citizenship of an unnamed person interested in the lawsuit. That suggestion is untenable.

Respondents ignore that § 1332(c)(1) is not silent on the rule for determining a corporation's citizenship. It provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *See* Pet. Br. 15. Respondents thus seek judicial amendment of that language to add the phrase, "and of the state of any unnamed corporate affiliate with some interest in the civil action." But this Court has long disfavored such statutory

rewriting because "[t]o do so would be to legislate, and not to interpret and give effect to the statute as passed by congress." *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 43 (1895) ("We have no authority to add to the [statute] the words, 'prior to his application.'"). This Court has specifically applied that restraint to § 1332(c) and "left further adjustments to be made by Congress." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks omitted). Thus, this Court should reject respondents' and the Fourth Circuit's suggestion to expand the express exceptions contained in § 1332(c)(1).

b. Respondents also mistakenly assert (Br. 20) that "[§] 1441(b) is irrelevant" and that petitioners' reading "expand[s] the scope of diversity jurisdiction" provided for in § 1332(a)(1). For the foregoing reasons, § 1332 cannot bend to respondents' needs. But even if it could, § 1441(b) is not only relevant, but controlling. While respondents are correct that § 1441(a) incorporates the original jurisdiction standard of § 1332, § 1441(b) plays a vital function in confirming that, just as under § 1332(a)(1), the only citizenship relevant to the diversity analysis is that of the "parties in interest properly joined and served." Respondents do not dispute that that phrase is best understood to incorporate this Court's holdings – rendered under § 1332 or its predecessors – that formal, nominal, or fraudulently joined parties are not to be considered in the diversity analysis. *See* Pet. Br. 24-25. Likewise, none of this Court's cases under §§ 1332 or 1441 can be read to require a court to attribute the citizenship of an unnamed, putative defendant to that of the named defendants, or to require those unnamed defendants to be joined. *See* Pet. Br. 17-28. To the contrary: § 1441(b)'s reference to "parties in interest properly joined and served" confirms that plaintiffs are not required to "join[] and serve[]" all potential "parties in interest" to their "civil action."

B. This Court's Cases Support Removal Here

As even respondents acknowledge (Br. 20), this Court's cases look only to the citizenship of the named parties.[2] Other doctrines further support removal here.

1. As masters of their complaint, plaintiffs' choice of whom to sue is respected even when they sue only diverse parties. *See* Pet. Br. 17-21. That principle supports removal here because it confirms that, aside from Rule 19 indispensable parties, courts are not empowered to add defendants that plaintiffs have declined to sue. Thus, in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), an automobile accident victim sued the other driver's diverse insurance company but not the non-diverse driver. This Court considered the citizenship only of the *named* defendant to find diversity. Pet. Br. 17-18.

Respondents concede (Br. 32) that *Lumbermen's* upheld the plaintiff's "strategic choice" to sue only the insurer, even though naming the insured would have destroyed diversity. They claim *Lumbermen's* does not apply because Lincoln "deliberately obscured" "the existence or identity of any potential defendant." *Id.*; *see also id.* at 34. Respondents cite nothing in *Lumbermen's* for that proposition. In any case, Lincoln obscured nothing, and respondents' own pleadings and conduct plainly show that they knew at the very outset of this case that Lincoln operated through agents and affiliates. *See infra* pp. 11-19. They simply ignored those affiliates until they lost on the merits.

This Court's cases analogously hold that the master-of-the-complaint rule permits a state-court plaintiff to decide

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[2] *See Carden*, 494 U.S. at 188 n.1 ("The question . . . which of the various parties *before the Court* should be considered for purposes of determining whether there is complete diversity of citizenship . . . will generally be answered by application of the 'real party to the controversy' test.") (emphasis added); *Rice v. Houston*, 80 U.S. (13 Wall.) 66, 67 (1871) ("it is the character of the real and not that of the nominal parties *to the record* which determines the question of jurisdiction") (emphasis added).

whether to allege federal claims and risk having the case removed, or to forgo them and keep the case in state court. *See* Pet. Br. 18-19. Respondents merely note that those cases concerned federal-question jurisdiction, without disputing that, if a plaintiff's similar tactical choices with respect to federal-question jurisdiction must be respected by a federal court, then there is no reason why similar choices should not be treated as dispositive for diversity jurisdiction. *See* Resp. Br. 32 n.9.

Respondents also have no response (*see id.*) to *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). There, the Court vacated a lower-court dismissal for the plaintiff's failure to name a supposedly indispensable, non-diverse party, and opined that "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." *Id.* at 111; *see* Pet. Br. 19. Except for the decision below, the lower courts have adhered to the principle that "a plaintiff is ordinarily free to decide who shall be parties to his lawsuit." *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171, 1174 (9th Cir. 1979) (Kennedy, J.). *See also* Pet. Br. 20.[3]

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[3] In *Simpson*, an Alaska citizen sued a Rhode Island parent corporation, but not its Alaska subsidiary, in a state-law employment dispute. *See* 608 F.2d at 1173. The plaintiff, however, was "held out to federal and state authorities as Subsidiary's employee," and the subsidiary had reimbursed the parent for "the full amount of [the plaintiff's wages]." *Id.* Despite the subsidiary's substantial interest, the court found diversity to exist based solely on the citizenship of the named parent corporation defendant. *See id.* at 1174-75. Important here, the court held that, "if under state law Simpson possessed no cause of action against the Rhode Island parent corporation because the parent was not Simpson's employer, the defendant was entitled to object by pleading or motion under Fed. R. Civ. P. 12." *Id.* at 1174. It did *not* hold that a court must reform the plaintiff's complaint to join a non-diverse affiliate after plaintiff loses on the merits. Respondents ignore *Simpson*'s core master-of-the-complaint holding and instead suggest the defendant sought dismissal for the plaintiff's failure to name the subsidiary *after* the defendant's preemption defense was rejected. *See* Resp. Br. 33 n.9. In fact, the parties jointly raised the potential jurisdictional issue "just prior to oral argument" on the preemption motion, not after it was decided. *Simpson*, 608 F.2d at 1173. *See also Simpson v. Providence Washington Ins. Group*, 423 F. Supp. 552, 553 n.1 (D. Ala. 1976), *aff'd*, 608 F.2d 1171 (9th Cir. 1979).

2. This Court's cases also permit plaintiffs voluntarily to dismiss non-diverse defendants to create diversity that was lacking at the outset of the case. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989). In view of those decisions, the Fourth Circuit's holding plainly makes no sense, because it ignores the litigation choices respondents actually made and substitutes in their stead a trap for successful defendants who must be ever-wary of plaintiffs' invocation of non-diverse, putative defendants. While the lower court's decision focused mainly on affiliates of Lincoln, the rule it fabricated has no logical stopping point and requires possible consideration of the jurisdictional consequences of all persons or entities under contract with the defendant or involved in some other way with the plaintiffs' allegations against the named defendant(s). *See* Pet. Br. 22-23 (discussing Fourth Circuit's suggestion that citizenship of mold remediation company hired by petitioners' agent is relevant to diversity).

Respondents seek to distinguish *Caterpillar* because it "concerned a technical removal flaw; the jurisdictional spoiler had been removed by the time of trial and judgment. In the instant case, the Fourth Circuit held that no jurisdiction ever vested in the federal courts because defendants failed to carry their burden of proving diversity." Resp. Br. 33-34. In *Caterpillar*, however, diversity did not exist at the time of removal, but the plaintiff cured that defect by later dismissing the non-diverse defendant. The Fourth Circuit's rule turns *Caterpillar* on its head by nullifying the jurisdictional consequences of a plaintiff's choice at the outset – declining to sue a non-diverse defendant – when this Court held that a plaintiff may permissibly dismiss a non-diverse defendant later in the case.

Caterpillar further found that, "[o]nce a diversity case has been tried in federal court, . . . considerations of finality, efficiency, and economy become overwhelming." 519 U.S. at 75. These concerns are no less present here, where summary judgment was awarded to petitioners after the parties had conducted considerable discovery.[4]

Respondents concede that *Newman-Green* held that "the Courts of Appeals, like District Courts, have the authority to dismiss a dispensable, nondiverse party to eliminate a jurisdictional defect." Resp. Br. 34. They attempt to distinguish that case, however, by pointing to the Court's observation that, if the case before it were dismissed for lack of diversity, then the plaintiff would simply re-file it in federal court and "proceed to a preordained judgment." *Newman-Green*, 490 U.S. at 827. The Court concluded there only that it made no sense, "merely for the sake of hypertechnical jurisdictional purity," to deny the court of appeals the same power held by the district court to dismiss a non-diverse, *named* defendant once the jurisdictional defect was discovered. *Id.* The Court never suggested that an *unnamed*, putative defendant's existence compels dismissal or remand.

C. Respondents' Other Arguments Fail

Respondents claim that "this Court has consistently applied (1) the 'real party to the controversy' test to both plaintiffs and defendants, and (2) rejected any suggestion that the courts are constrained in their review by the

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[4] Respondents' reliance (Br. 34) on *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004), is likewise inapt. That case distinguished *Caterpillar* in the context of applying a very different time-of-filing rule prohibiting a non-diverse party from changing *its own* citizenship after the case was filed to create diversity. *See id. at* 574 ("'[W]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit.'") (quoting *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 556 (1829) (Marshall, C.J.)); *id.* at 571 ("We have adhered to the time-of-filing rule regardless of the costs it imposes."). The time-of-filing rule has no relevance here, because neither side has attempted to alter the citizenship of any named party to the complaint.

identity of the parties enumerated in the complaint." Resp. Br. 21. None of the cases they identify supports their position that diversity is based on unnamed, putative defendants that have an interest in the lawsuit.

1. Respondents primarily rely (Br. 21) on a line of inapposite cases applying the real-party-in-interest analysis to plaintiff representatives of non-party beneficiaries. Because a trustee has the power to hold and to manage the assets of others, the trustee is a real party to the controversy empowered by statute or rule to sue in his or her own name.[5] None of those cases suggests that the existence of unnamed, putative *defendants* destroys diversity. Indeed, in one case highlighted by respondents, this Court held that a corporation is a citizen in its own right and is a citizen of its state of incorporation. *See Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 328-29 (1853). Nothing in that case suggests that a court may look to *unnamed* affiliates of the named corporate defendant in determining diversity jurisdiction. As explained above, § 1332 does not authorize such an inquiry.

In *McNutt v. Bland*, 43 U.S. (2 How.) 9 (1844), the Court simply applied the rule that a *named* party who is merely nominal is irrelevant to the diversity analysis. *See id.* at 14-15 (citizenship of non-diverse state governor having no interest in suit disregarded as nominal where statute required diverse private plaintiff to sue in governor's name). In that nominal-party line of cases, the Court looks only at the *named* defendants to determine whether

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[5] Thus, the "trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462 (1980); *see* Pet. Br. 27-28 (discussing *Navarro*); *Rice*, 80 U.S. (13 Wall.) at 66 (same); *Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1870) (same); *see also* Fed. R. Civ. P. 17(a). Respondents incorrectly assert (Br. 22) that the court of appeals did not rely on Rule 17(a), which they concede applies only to plaintiffs. *See* Pet. Br. 25-26. The court expressly held, however, that "joinder of the 'real party in interest' would be required under Rule 17(a)." Pet. App. 17a n.17; *see* Pet. Br. 24.

their citizenship may be disregarded in the diversity analysis. But the Court does *not* examine the citizenship of putative, unnamed defendants. *See* Pet. Br. 24-25.

2. Respondents next rely (Br. 23-24) on the doctrine that a suit against a state's alter ego is in fact against the state itself. A state may not be sued in diversity because it is not a "citizen" for purposes of § 1332(a)(1). In *State Highway Commission of Wyoming v. Utah Construction Co.*, 278 U.S. 194, 199 (1929), this Court dismissed such a case where "[t]he state acting through the highway commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. . . . The commission was but the arm or alter ego of the state, with no funds or ability to respond in damages."

That line of cases is inapposite here because there is no suggestion that Lincoln is the alter ego of a state. It is necessary to treat a suit against a state's alter ego as one against the state "to afford the States the dignity and respect due sovereign entities" and thereby to preserve a state's Eleventh Amendment right not to be haled into federal court. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 769 (2002). Those special concerns have no applicability to a private lawsuit. In any case, Lincoln is not alleged to be the "alter ego" of any of its affiliates, but it is a real party in interest in its own right. *See* Pet. Br. 5-6, 15-17; *infra* pp. 12-14.

3. Finally, respondents claim (Br. 24) that "the inquiry made by the Fourth Circuit is consistent with this Court's disapproval of the manipulation of corporate affiliates to manufacture diversity" under 28 U.S.C. § 1359. Section 1359, however, applies only to parties "improperly or collusively *made or joined* to invoke the jurisdiction of the court" (emphasis added). What respondents complain about here is their decision *not* to join a putative, nondiverse defendant. As we explain (Pet. Br. 20 n.16), and as respondents do not dispute, § 1359 does not proscribe nonjoinder (even if the nonjoinder is collusive, which is not the case here). *See Western Maryland Ry. v. Harbor*

Ins. Co., 910 F.2d 960, 964 (D.C. Cir. 1990) (Thomas, J.); *Simpson*, 608 F.2d at 1174-75 (Kennedy, J.).[6]

D. Respondents' Accusations Of Deception By Lincoln Are Baseless

As masters of their complaint, respondents chose the theory of their case and the defendants they sued. Only after losing on the merits did they begin casting about for jurisdictional spoilers. To mask that dispositive fact, they open a fire hose of invective, claiming Lincoln "deliberately obscured" the existence of its affiliates. Br. 32. Respondents thus relentlessly (but groundlessly) blame Lincoln for the case they themselves chose to bring, and for not answering discovery-type questions respondents never propounded and pose for the first time in this Court.

Respondents' original complaints alleged that "Lincoln is one of the largest and most diversified real estate firms in the United States," Lincoln's headquarters were in Texas, "Lincoln trades under various and sundry names throughout the United States," and respondents would, "[u]pon further discovery," "determine if additional defendant or defendants will be named." JA 27-28, 53-54. Two months later, they proposed an amended complaint colorfully alleging that Lincoln had an "'Enronesque' system" with "layers of subsidiaries and/or other controlled entities." Proposed Amended Complaint ¶ 7(d) (Oct. 25, 2002) (Dist. Ct. Dkt. Entry 21).[7] Two more months later, they

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[6] Even farther afield is respondents' reliance (Br. 26) on the principle that "this Court realigns parties according to their interests in the dispute, regardless of how the plaintiff labels them." There is no claim here that a defendant should be realigned as a plaintiff, or vice-versa.

[7] *See also* Proposed Amended Complaint ¶ 7(e) (Oct. 25, 2002) (Dist. Ct. Dkt. Entry 21) ("under the legal principles of agency, both the principal and the agent can be held accountable"); *id.* ¶ 50(k) ("All the above malfeasance and misfeasance acts of defendant, Lincoln, were done through its agents, 'SWIB' and INVESCO, or by Lincoln itself, as further discovery should reveal."); *id.* ¶ 58(c) ("Defendant, INVESCO, upon information and belief, will be shown to be one of the subsidiaries and/or wholly-owned subsidiary, and/or controlled agent of the [*sic*]

filed a second amended complaint that dropped any mention of Lincoln Property Company ECW, Inc. – a Lincoln affiliate that respondents had mentioned only in the captions of their original complaints. JA 114. And each of respondents' complaints based Lincoln's alleged liability on an agency theory. *See* Pet. Br. 6, 16-17. Given the way they have litigated this case, what respondents seek is to be freed of any burden either to do any research on a defendant's organizational structure before filing their complaint or to conduct any needed discovery afterward.

1. Lincoln Is Clearly an Interested Rather Than a "Nominal" Defendant

Respondents assert "that Lincoln was in effect a nominal party – that, because Lincoln was not authorized to do business in Virginia (*see* JA 234-35[8]), there must have been other 'Lincoln' entities operating out of Lincoln's Herndon, Virginia, offices and managing Westfield." Resp. Br. 9. Respondents never explain what they mean by "nominal." They appear to suggest that, because Lincoln managed Westfield Village Apartments in Virginia through an affiliate (EQR) rather than directly, respondents are entitled to seek out affiliates to destroy diversity that they have never sought to add as defendants.

a. Lincoln's presence in the case is not "nominal." Respondents did not sue Lincoln because it performed a merely ministerial act. Under the theory of plaintiffs' complaints, Lincoln (which was listed as SWIB's agent in the lease) faced a real potential liability either (1) for its own acts, (2) as the agent of SWIB, (3) as a joint tortfeasor with SWIB or another Lincoln affiliate, or (4) for the acts of its own agents. *See* Pet. Br. 3-4, 16-17. Moreover,

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Lincoln and/or SWIB and is an entity that was set up to evade the responsibility and accountability for the actions of Lincoln Property.").

[8] Virginia law provides that "the failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of its corporate acts or prevent it from defending any proceeding in this Commonwealth." Va. Code Ann. § 13.1-920 (2005).

plaintiffs also sued SWIB, the *owner* of Westfield Village, on a similar theory of responsibility for the acts both of SWIB itself and of SWIB's agents (including Lincoln). Thus, even if Lincoln were deemed a "nominal" party (and thereby subject to dismissal), respondents still could have chosen to allege its claims against SWIB. Respondents, however, never acknowledge that plain fact.[9]

b. Moreover, even if Lincoln were a "nominal" defendant inasmuch as it could not be held liable on the merits of respondents' claims, that would not be grounds for the

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[9] Respondents assert "that Lincoln did not carry its burden of proof that it was a foreign corporation." Resp. Br. 28. That is incorrect. Respondents' own complaints allege that "Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas." JA 27, 53. Likewise, neither respondents nor the court below questioned that Lincoln's principal place of business is in Texas, *see* JA 77, 81, and the court expressly held that "the nominal party and ultimate parent company, Lincoln Property Company, is a Texas citizen," Pet. App. 16a. The record also contains official documents from the State of Texas confirming that Lincoln is a Texas corporation, *see* JA 241-46, and the authenticity of those documents has never been questioned. The deposition testimony misconstrued by respondents (Br. 6-7) in suggesting that Lincoln was instead a partnership cannot be used to impugn those official state public records. *See, e.g., Acord v. Western Pocahontas Corp.*, 156 F. 989, 1000 (C.C.S.D. W. Va. 1907) (giving "judicial notice" to "the public records of this state" showing dissolution of a corporation), *aff'd*, 174 F. 1019 (4th Cir. 1909); *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1232 (W.D. Wash. 2003) (giving "judicial notice" to articles of incorporation as "certified public records kept by the Secretaries of State in Washington and Delaware"). No Texas statute provides that a corporation can also be a partnership. *See Merrill v. Town of Monticello*, 138 U.S. 673, 684 (1891) (rejecting allegation concerning powers of a corporation as "inconsistent with the public laws of the state, of which the courts of the United States take judicial notice"). In any case, none of respondents' scattershot deposition questions attempted to probe the relationship between Lincoln and Lincoln affiliates that were not sued. It thus seems obvious from the deposition excerpt cited by respondents (Br. 6) that the reference to "Lincoln" meant something different to the examining attorney and the deponent, and counsel never sought clarification of that ambiguity. *See also, e.g.*, JA 176 ("We're in partnerships. Various Lincoln partnerships are in ownership – various Lincoln partners are partners in partnerships that own assets.").

Court to cast about for new defendants. It would simply mean that Lincoln would be dismissed. *See Simpson*, 608 F.2d at 1174. We are aware of no case – and respondents have cited none – in which this Court authorized substitution of a putative, unnamed defendant once a plaintiff lost on the merits against the named defendant.

To the contrary, this Court's cases labeling defendants as "nominal" in the diversity context concern *named*, non-diverse parties whose citizenship may nevertheless be disregarded because they did not have a substantive stake in the case. Thus, for example, the presence of a non-diverse trustee sued only to perform the ministerial act of transferring property to the prevailing party does not destroy diversity. *See* Pet. Br. 25 & n.21. This nominal-party doctrine serves to *prevent* plaintiffs from *defeating* a defendant's "right of removal . . . by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Respondents have no basis for suggesting that this rule permits them to defeat removal after losing on the merits by identifying a putative defendant they never sued.

2. The Citizenship of ECW I Is Irrelevant

From their original complaints, respondents acknowledged that Lincoln operated or might operate through various affiliated entities and that discovery would be needed if respondents wanted to make those affiliate relationships an issue in the suit. *See supra* pp. 11-12.

Indeed, respondents listed one of those affiliates in the caption of their original complaints, which named Lincoln and then added the phrase "t/a Lincoln Property Company ECW, Inc., Agent." JA 26, 52.[10] Respondents presumably mentioned ECW I because it was the Lincoln entity that

[10] Respondents refer to this t/a entity as "ECW I." For the Court's convenience, so will petitioners.

issued Mr. Roche's paycheck.[11] Nevertheless, ECW I was not a party defendant because respondents made no mention of ECW I in the body of their original complaints.[12]

Moreover, long before this case reached the Fourth Circuit, respondents *voluntarily dropped* from the second amended complaint's caption any mention of ECW I. *See* JA 114. Respondents also failed to mention ECW I in the body of that complaint, which they now concede (Br. 38) is the only relevant complaint here. *See* Pet. Br. 31 & n.25. Respondents presumably dropped ECW I because they (1) declined in the amendment to re-allege Mr. Roche's employment claim and (2) chose to allege their amended breach of lease claim against only SWIB (a claim they subsequently dismissed voluntarily in the district court). *See* Pet. Br. 6; JA 182.[13] Nor did respondents issue a single discovery request or ask a single deposition question about ECW I. Their own pleadings thus confirm that respondents made a strategic choice to prosecute their case only against Lincoln and SWIB. Indeed, even in its mis-

[11] ECW I also executed the lease as agent for SWIB, *see* JA 94, but respondents claimed that they no longer had a copy of the lease when they filed their original complaints, *see* JA 28-29, 54-55.

[12] *See, e.g., Jeffries v. Jeffries' Ex'r*, 96 S.E. 197, 198 (Va. 1918) ("The bill must contain averments showing some cause for relief against him, else he is no party to the litigation."); *Collins v. Kibort*, 143 F.3d 331, 334-35 (7th Cir. 1998) ("The caption is plainly incorrect. A plaintiff cannot state a claim against a defendant by including the defendant's name in the caption."); *see also* Pet. Br. 33 n.27. In any case, respondents admit that they sued only one "entity," Resp. Br. 4, *i.e.*, Lincoln.

[13] Respondents dismissed their breach of lease claim shortly after Mr. Roche invoked his Fifth Amendment privilege 40 times at a deposition in response to questions about apparently falsified income documents, including an IRS Form 1099, submitted by respondents in connection with their apartment lease application. *See* Defendants' Motion to Compel Discovery and for Sanctions at 4 (Jan. 29, 2003) (Dist. Ct. Dkt. Entry 34); Order (Feb. 7, 2003) (Dist. Ct. Dkt. Entry 51) ("Defendants' motion to overrule assertions of Fifth Amendment privilege and to further depose Plaintiffs is GRANTED."); Motion to Voluntary [*sic*] Dismiss Count II (Feb. 13, 2003) (Dist. Ct. Dkt. Entry 59); JA 182.

taken view of Lincoln's affiliates, the Fourth Circuit did not view ECW I as a relevant entity for diversity jurisdiction; its single mention of ECW I is in its recitation of the captions of the original complaints. *See* Pet. App. 2a.[14]

It is remarkable in the face of respondents' own demonstrated lack of interest in suing ECW I that they now chide Lincoln for having "remained silent as to the corporate citizenship of one key affiliate – the corporate entity that signed the Roches' lease," Resp. Br. 4, *i.e.*, ECW I. Petitioners did no wrong in "remaining silent" about an entity that respondents chose not to sue and about which they asked no questions in discovery.[15]

Respondents' attempt for the first time in this Court to make a jurisdictional issue out of ECW I confirms that application of the Fourth Circuit's novel jurisdictional rule would usher in an era of re-litigation catastrophes in district courts across the country. *See* Pet. Br. 15-16, 19, 22-24, 36-38. Respondents' new focus on an entity that they chose not to sue amply demonstrates the lengths to which plaintiffs will go to have a loss on the merits vacated and the case remanded to state court for a fresh start. Adoption of the court of appeals' wayward rule would require the district courts to entertain – indeed, they would have an ongoing and *sua sponte* duty to stage – such three-ring jurisdictional circuses. For businesses (such as in the real estate industry) that have sound reasons to conduct their commerce using multiple entities, the jurisdictional mischief created by the lower court's rule would be endless.[16]

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[14] Respondents thus falsely assert (Br. 4) that the court held that Lincoln's "silen[ce]" as to ECW I was "designed to shroud the identity of real parties to the controversy." The court held no such thing.

[15] In any case, ECW I is a Texas corporation, as confirmed by that state's corporate records. *See* Westlaw Database Corp-TX (search for Reg. No. 0070542500). Had ECW I been made a party, Lincoln would also have shown that its principal place of business is in Texas.

[16] *See* Real Estate Roundtable *et al.* Amicus Br. 6-13. At various points, respondents seek artificially to limit the lower court's holding to "non-public entities" "which are not candid as to their role, and that of their affiliates, in the transaction or occurrence at issue." Resp. Br. 37. That is plainly incorrect. The Fourth Circuit itself never limited its holding to non-public entities. Public business associations can also operate through complex structures for a variety of legitimate reasons.

3. The Citizenship of EQR and Any Other Lincoln Affiliate Is Irrelevant

The court of appeals appeared to hold that EQR, the entity that collected the management fees for Westfield Village, was an indispensable party without whose presence the case could not proceed. *See* Pet. App. 11a-13a, 16a. Accordingly, the court's decision functionally abrogated Rule 19. *See* Pet. Br. 28-36.

a. Respondents do not dispute that EQR was not an indispensable party. Instead, they claim that "the Court of Appeals was explicit that it was unable to identify the real parties to the controversy." Resp. Br. 35. But the court discussed the evidence of EQR's citizenship at length, *see* Pet. App. 12a-13a, which would have been unnecessary had the court thought EQR's citizenship was irrelevant.[17] Thus, whether one views the court to have functionally held that only EQR was indispensable, or that EQR plus some indeterminate number of other Lincoln affiliates were indispensable, the result is the same. Under the guise of its flawed real-party-in-interest analysis, the court of appeals plainly held that those affiliates must be made parties. *See id.* at 16a ("to be accurate, both the Texas parent and the Virginia sub-'partnership' *should be parties* to the instant action") (emphasis added). Requiring unnamed defendants to be joined, however, is the province of Rule 19 – not the diversity or removal statutes. And respondents concede that Rule 19 "suppl[ies] standards" where a court "is in fact able to identify" "an unnamed, non-diverse, real party to the controversy." Resp. Br. 38.

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[17] As petitioners point out – and as respondents do not in any way contest – the court of appeals' analysis of EQR's citizenship was both wrong and internally inconsistent. *See* Pet. Br. 45-47 & n.37.

Respondents also claim (Br. 5) that Lincoln committed deception by admitting the second amended complaint's allegation that Westfield Village "is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Virginia." JA 115; *see* JA 137. Respondents now assert (Br. 5) – for the first time in this litigation – that Lincoln should have answered "that its 'regional offices' were in fact separate, affiliated entities." But the management personnel in those regional offices, such as the Texas-based EQR that employed them, were Lincoln's agents. It was thus certainly correct for Lincoln to admit that it managed Westfield Village through the agents in its "regional offices." Indeed, the allegation itself appears rooted in the agency theory that pervades each of respondents' various complaints.[18]

b. In any case, Lincoln filed the answer about which respondents complain on January 6, 2003.[19] Respondents concede (Br. 7-8) that, just nine weeks later, on March 13, 2003, Lincoln voluntarily disclosed that its affiliate, EQR, collected the management fees for Westfield Village in a letter responding to respondents' request for proof that Lincoln could satisfy a judgment in the event it lost at trial. *See* JA 236. Nothing about that response was dilatory or deceptive, yet respondents nonetheless never sought discovery about EQR or attempted to join EQR as a defendant.

Tellingly, respondents avoid answering the obvious question: Why, after learning that EQR collected the management fees for Westfield Village, did they not move

[18] Equally without merit is respondents' claim (Br. 5) of deception in Lincoln's answer that "Lincoln advertised in newspapers and in realtor brochures that it was the owner and property manager of Westfield Village Apartments." JA 115. Respondents identify no rule requiring disclosure of affiliates or agents in a company's public advertising.

[19] Petitioners were never required to answer the original complaints, which were filed in August 2002, because petitioners had moved to dismiss them. *See* Fed R. Civ. P. 12(a)(4)(A).

to join EQR as a defendant? The obvious answer is that they simply chose to focus their suit on SWIB and Lincoln. That is perfectly consistent both with their strategy of declining to sue ECW I and with their agency theories of liability, pursuant to which Lincoln could be liable if respondents could prove their claims.

Finally, respondents complain that, "[a]lthough EQR was identified as the recipient of the management fees for Westfield, there was no disclosure as to which Lincoln entity (or entities) performed management services at Westfield." Resp. Br. 8. Respondents, however, never asked for information about which of Lincoln's agents or affiliates was responsible for managing Westfield Village.[20] In their view, a plaintiff may fail to take discovery geared to identify additional defendants, lose on the merits, and then have the case dismissed for lack of complete diversity because the defendants did not volunteer information about putative, unnamed defendants about which the plaintiffs never bothered to ask.[21]

[20] Respondents concede that, in response to the Fourth Circuit's unanticipated new rule, Lincoln established on remand that, apart from EQR, "'[n]o other entity . . . was involved in the management of Westfield Village or . . . received fees or revenue of any kind for the management of it.'" Resp. Br. 13. *See* Addendum, *infra*, 3a (Declaration of Dan M. Jacks (Aug. 5, 2004) (Dist. Ct. Dkt. Entry 186)); *cf.* Resp. Br. 12 n.3.

[21] This Court should express disfavor with the *sua sponte* nature of the court of appeals' decision. *See* Pet. Br. 38-41. Although respondents note (Br. 41) that jurisdictional issues were briefed in the district court, they do not dispute that the novel issue created and decided by the Fourth Circuit was never briefed or argued. *See* Pet. Br. 38 & n.32. And, because the court of appeals decided the jurisdictional issues in a *sua sponte* manner, the *sua sponte* point is "fairly included" within both questions presented. Sup. Ct. Rule 14.1(a); *cf. Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Finally, while respondents note (Br. 41-42) that petitioners moved for rehearing, they do not dispute that a summary denial of a rehearing petition is not a decision on the merits of the arguments raised in the petition, and thus does not provide the opportunity to be heard required by the Fifth Amendment. *See* Pet. Br. 39 n.33.

II. THE FOURTH CIRCUIT'S "VERY CLOSE NEXUS" TEST IS CONTRARY TO LAW

The citizenship of a limited partnership is determined by the citizenship of each of its partners. *See Carden*, 494 U.S. at 195. Both this Court and Congress have declined to make the principal-place-of-business test applicable to such unincorporated associations. *See* Pet. Br. 41-44. Accordingly, this Court should also reverse the Fourth Circuit's novel holding that a limited partnership with "a very close nexus with the Commonwealth" of Virginia is a citizen of that state for diversity purposes. Pet. App. 16a.

Respondents do not dispute that the nexus test is unlawful. Instead, they claim the court did not apply it, yet they admit (Br. 40) that it held "that the existence of this nexus was further evidence of Lincoln's obfuscation." Plainly, the court applied its nexus test to EQR. After reviewing evidence of a Virginia nexus, it held that "[a]ll of this militates in favor of finding that the real and substantial party in interest is the Lincoln entity (partnership or not); probably Lincoln/EQR Limited Partnership." Pet. App. 15a; *accord* Resp. Br. 40 ("the Court subsumed all those indicia under a comment on 'a very close nexus with the Commonwealth'"). Given that the court relied on its nexus test to find complete diversity lacking, respondents cannot fairly claim that the nexus question "is not fairly raised in the Fourth Circuit's opinion." *Id.* at 41.[22]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[22] While the citizenship of EQR should be irrelevant because EQR was never named as a defendant, it is clear – and respondents nowhere dispute – that EQR is *not* a Virginia citizen because none of its general or limited partners is a citizen of Virginia. *See* Pet. Br. 45-47.

Respectfully submitted.

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August 24, 2005

ADDENDUM

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Memorandum in Support of Emergency Motion for Relief from Mandate and, In The Alternative, To Present New Evidence, *Christophe Roche, et al. v. Lincoln Property Co., et al.*, Civil Action No. 02-1390-A (GBL) (E.D. Va. filed Aug. 5, 2004):

Ex. E (Declaration of Dan M. Jacks dated Aug. 5, 2004) 2a

Ex. F (Declaration of Jeff Franzen dated Aug. 5, 2004) 4a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,
v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Aug. 5, 2004]

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR RELIEF FROM MANDATE AND, IN THE ALTERNATIVE, TO PRESENT NEW EVIDENCE

[text, signature block, and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DECLARATION OF DAN M. JACKS

Dan M. Jacks, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I am the General Counsel and Vice President of Lincoln Property Company ("Lincoln"). Furthermore, I am the General Counsel, Vice President and Assistant Secretary for Lincoln Eastern Management Corporation, Lincoln E.C.W. Property Management, Inc., and EQR/Lincoln Limited Partnership ("EQR"). As such, I have personal knowledge concerning EQR's operations and revenues.

3. EQR was formed in 1997 and, since that date, has provided property management services (commonly referred to as "fee-management" services) for multi-family residential real estate projects owned by third-parties, such as insurance companies, person funds and real estate investors.

4. Both at the date of filing of the above-captioned lawsuit (August 22, 2002) and the date of its removal to federal court (September 17, 2002), EQR's headquarters

and principal place of business were located in Dallas, Texas.

5. On the date of filing and removal, EQR managed multi-family residential real estate projects in jurisdictions all over the country, including Texas, New Mexico, Colorado, Indiana, Pennsylvania, Ohio, Missouri, Illinois, Kansas, Minnesota, Wisconsin, Michigan, New Jersey, Massachusetts, Virginia, South Carolina and California.

6. As of the date of filing and removal, EQR fee-managed 281 projects (including 79,487 apartment units) around the country. Five (5) percent of those projects (fifteen (15) projects, including 5,500 units) were located in Virginia.

7. In 2002, EQR's revenues for fee-management services was $17,353,300. Only fourteen (14) percent of those revenues arose from fee management services that EQR provided for properties located in Virginia.

8. One of the 281 projects for which EQR provided fee-management services in 2002 was Westfield Village, a multi-family housing project located in Fairfax, Virginia owned by the State of Wisconsin Investment Board ("SWIB"), the subject of the above-captioned lawsuit. EQR is the only entity that received fees for the management of Westfield Village. No other entity affiliated with Lincoln (1) was involved in the management of Westfield Village or (2) received fees or revenue of any kind for the management of it.

I hereby declare under penalty of perjury that the foregoing information is true and correct.

8-5-04
Date

/s/ DAN M. JACKS
Dan M. Jacks

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DECLARATION OF JEFF FRANZEN

Jeff Franzen, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I have been and am a limited liability partner in several partnership [*sic*] that were formed to participate in the ownership of multi-family housing projects. As of the date of filing of the above-captioned lawsuit (August 22, 2002) and the date of its removal to federal court (September 17, 2002), I was a limited liability partner in the following partnerships:

a. Lincoln Property Company No. 2092 Limited Partnership, which had an indirect ownership interest in a multi-family housing project in Haverhill, Massachusetts;

b. Lincoln Property Company No. 2144 Limited Partnership, which had an indirect ownership interest in a multi-family housing project called "Marina Bay II" in Quincy, Massachusetts;

c. Lincoln Property Company No. 2176 Limited Partnership, which had an indirect ownership interest

in a multi-family housing project called "Bethel Park" in Bethel Park, Massachusetts;

d. Lincoln Property Company No. 2348 Limited Partnership, which had an indirect ownership interest in the following multi-family housing projects:

Liberty Park Apartments in Braintree, Massachusetts

Riverpointe Apartments in Lawrence, Massachusetts

Marina Bay I in Quincy, Massachusetts

North Pier in Jersey City, New Jersey

Hudson Point in Jersey City, New Jersey

Fairfax Corner Apartments in Fairfax, Virginia

Potomac Yards in Alexandria, Virginia

Reserve at Town Center in Loudoun County, Virginia; and

e. Lincoln Property Company No. 1341 Limited Partnership, which had an indirect ownership interest in a multi-family housing project called "Windridge Apartments," Phases I and II, in Grand Prairie, Texas.

3. As described above, each of these partnerships was formed to participate indirectly in the ownership of real property. The partnership that directly owned the property acquired raw land (or, in one case, a pier) and then developed a multi-family housing project on the property which, in most cases, was subsequently sold or transferred by the partnership.

4. None of the partnerships in which I was a limited liability partner is engaged in or has ever been engaged in the property management of any multi-family housing project.

5. Westfield Village, the subject of the above-captioned lawsuit, is a multi-family housing project located in Fairfax, Virginia owned by the State of Wisconsin Investment Board ("SWIB"). None of these partnerships

was involved in any way in the ownership, operations or management of Westfield Village. None of these partnerships received any fees, revenue or income of any kind for the management of Westfield Village.

I hereby declare under penalty of perjury that the foregoing information is true and correct.

8/5/04
Date

/s/ JEFF FRANZEN
Jeff Franzen

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LINCOLN PROPERTY CO. ET AL. *v.* ROCHE ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04–712. Argued October 11, 2005—Decided November 29, 2005

Title 28 U. S. C. §1441 authorizes the removal of civil actions from state court to federal court when the state-court action is one that could have been brought, originally, in federal court. When federal-court jurisdiction is predicated on the parties' diversity of citizenship, see §1332, removal is permissible "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action [was] brought." §1441(b).

Christophe and Juanita Roche, plaintiffs below, respondents here, leased an apartment in a Virginia complex, Westfield Village, managed by Lincoln Property Company (Lincoln). The Roches commenced suit in state court against diverse defendants, including Lincoln, asserting serious medical ailments from their exposure to toxic mold in their apartment, and alleging loss, theft, or destruction of personal property left in the care of Lincoln and the mold treatment firm during the remediation process. The Roches identified themselves as Virginia citizens and defendant Lincoln as a Texas corporation. Defendants removed the litigation to a Federal District Court, invoking that court's diversity-of-citizenship jurisdiction. In their consolidated federal-court complaint, the Roches identified themselves and Lincoln just as they did in their state-court complaints. Lincoln, in its answer, admitted that it managed Westfield Village, and did not seek to avoid liability by asserting that some other entity was responsible for managing the property. After discovery, the District Court granted defendants' motion for summary judgment, but before judgment was entered, the Roches moved to remand the case to state court. The District Court denied the motion, but the Fourth Circuit reversed, holding the removal improper on the ground that Lincoln failed to show the nonexistence of an affiliated Virginia en-

Syllabus

tity that was a real party in interest.

Held: Defendants may remove an action on the basis of diversity of citizenship if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum State. It is not incumbent on the named defendants to negate the existence of a potential defendant whose presence in the action would destroy diversity. Pp. 6–13.

(a) The Fourth Circuit correctly identified Lincoln as a proper party, but erred in insisting that some other entity affiliated with Lincoln should have been joined as a codefendant, and that it was Lincoln's obligation to name that entity and show that its joinder would not destroy diversity. This Court stresses, first, that the existence of complete diversity between the Roches and Lincoln is plain and no longer subject to debate. The Court turns next to the reasons why the Fourth Circuit erred in determining that diversity jurisdiction was not proved by the removing parties. Since *Strawbridge* v. *Curtiss*, 3 Cranch 267, this Court has read the statutory formulation "between . . . citizens of different States," 28 U. S. C. §1332(a)(1), to require complete diversity between all plaintiffs and all defendants. While §1332 allows plaintiffs to invoke diversity jurisdiction, §1441 gives defendants a corresponding opportunity. The scales are not evenly balanced, however. An in-state plaintiff may invoke diversity jurisdiction, but §1441(b) bars removal on the basis of diversity if any "part[y] in interest properly joined and served as [a] defendan[t] is a citizen of the State in which [the] action is brought." In this case, Virginia plaintiffs joined and served no Virginian as a party defendant. Hence, the action qualified for the removal defendants effected. Neither Federal Rule of Civil Procedure 17(a), captioned "Real Party in Interest," nor Rule 19, captioned "Joinder of Persons Needed for Just Adjudication," requires plaintiffs or defendants to name and join any additional parties to this action. Both Rules address party joinder, not federal-court subject-matter jurisdiction. The Fourth Circuit and the Roches draw from this Court's decisions a jurisdictional "real parties to the controversy" rule applicable in diversity cases to complaining and defending parties alike. But the Court is aware of no decision supporting the burden the Fourth Circuit placed on a properly joined defendant to negate the existence of a potential codefendant whose presence in the action would destroy diversity. Pp. 6–9.

(b) This Court's decisions employing "real party to the controversy" terminology bear scant resemblance to the Roches' action. No party here has been "improperly or collusively" named solely to create federal jurisdiction, see, *e.g.*, 28 U. S. C. §1359, *Kramer* v. *Caribbean Mills, Inc.*, 394 U. S. 823, 830. Nor are cases in which actions against a state agency have been regarded as suits against the State itself,

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see *State Highway Comm'n of Wyo.* v. *Utah Constr. Co.*, 278 U. S. 194, 199–200, relevant to suits between private parties. Unlike cases in which a party was named to satisfy state pleading rules, *e.g.*, *McNutt ex rel. Leggett, Smith, & Lawrence* v. *Bland*, 2 How. 9, 14, or was joined only as designated performer of a ministerial act, *e.g.*, *Walden* v. *Skinner*, 101 U. S. 577, 589, or otherwise had no control of, impact, or stake in the controversy, *e.g.*, *Wood* v. *Davis*, 18 How. 467, 469–470, Lincoln has a vital interest in this case. Indeed, Lincoln accepted responsibility, in the event the Roches prevailed on the merits, by admitting that it managed Westfield Village. In any event, the Fourth Circuit had no warrant in this case to inquire whether some other person might have been joined as an additional or substitute defendant. Congress, empowered to prescribe the jurisdiction of the federal courts, sometimes has specified that a named party's own citizenship does not determine its diverse status. But Congress has not directed that a corporation, for diversity purposes, shall be deemed to have acquired the citizenship of all or any of its affiliates. For cases like the Roches', Congress has provided simply and only that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." §1332(c)(1). The jurisdictional rule governing here is unambiguous and not amenable to judicial enlargement. Under §1332(c)(1), Lincoln is a citizen of Texas alone, and under §1441(a) and (b), this case was properly removed. Pp. 9–13.

373 F. 3d 610, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–712

LINCOLN PROPERTY COMPANY, ET AL., PETITIONERS *v.* CHRISTOPHE ROCHE ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[November 29, 2005]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns 28 U. S. C. §1441, which authorizes the removal of civil actions from state court to federal court when the action initiated in state court is one that could have been brought, originally, in a federal district court. §1441(a). When federal-court jurisdiction is predicated on the parties' diversity of citizenship, see §1332, removal is permissible "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action [was] brought." §1441(b).

Christophe and Juanita Roche, plaintiffs below, respondents here, are citizens of Virginia. They commenced suit in state court against diverse defendants, including Lincoln Property Company (Lincoln), a corporation chartered and having its principal place of business in Texas. The defendants removed the litigation to a Federal District Court where, after discovery proceedings, they successfully moved for summary judgment. Holding the removal improper, the Court of Appeals instructed remand of the action to state court. 373 F. 3d 610, 620–622 (CA4 2004). The appellate court so ruled on the ground that the Texas

defendant failed to show the nonexistence of an affiliated Virginia entity that was the "real party in interest." *Id.*, at 622.

We reverse the judgment of the Court of Appeals. Defendants may remove an action on the basis of diversity of citizenship if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum State. It is not incumbent on the named defendants to negate the existence of a potential defendant whose presence in the action would destroy diversity.[1]

I

Christophe and Juanita Roche leased an apartment in the Westfield Village complex in Fairfax County, Virginia. About a year after moving in, they discovered evidence of toxic mold in their apartment. Expert inspection confirmed the presence of mold, which the inspection report linked to hair loss, headaches, irritation of the respiratory tract, fatigue, and dermatitis. App. 184–190. The report stated that spores from toxigenic mold species were airborne in the apartment and had likely contaminated the carpeting and fabric surfaces throughout the dwelling. *Id.*, at 188. The Roches moved out of their apartment for the remediation process, leaving their personal belongings

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[1]Defendants below, petitioners here, presented a second question in their petition for certiorari: Can a limited partnership be deemed a citizen of a State on the sole ground that the partnership's business activities bear a "very close nexus" with the State? Because no partnership is or need be a party to this action, that question is not live for adjudication. We note, however, that our prior decisions do not regard as relevant to subject-matter jurisdiction the locations at which partnerships conduct business. See *Carden* v. *Arkoma Associates*, 494 U. S. 185, 189, 192–197 (1990) (for diversity purposes, a partnership entity, unlike a corporation, does not rank as a citizen; to meet the complete diversity requirement, all partners, limited as well as general, must be diverse from all parties on the opposing side).

in the care of Lincoln, the designated property manager of Westfield Village, and the mold treatment firm. 373 F. 3d, at 612.

Some months later, the Roches commenced suit, filing two substantially similar complaints in the Circuit Court for Fairfax County, Virginia. App. 27–50, 53–75. Both complaints asserted serious medical ailments from the Roches' year-long exposure to toxic mold, and sought damages under multiple headings, including negligence, breach of contract, actual fraud, constructive fraud, and violations of Virginia housing regulations. *Id.*, at 38–48, 64–74. In addition, the Roches alleged loss, theft, or destruction of their personal property (including irreplaceable family keepsakes) during the remediation process. Regarding these losses, they sought damages for conversion and infliction of emotional distress. *Id.*, at 49–50, 74–75.

In state court, the Roches' complaints named three defendants: Lincoln; INVESCO Institutional, an investment management group; and State of Wisconsin Investment Board, the alleged owner of Westfield Village. *Id.*, at 26–28, 52–54. The complaints described Lincoln as "a developer and manager of residential communities, including . . . Westfield Village." *Id.*, at 27, 53. "[A]cting by and through [its] agents," the Roches alleged, Lincoln caused the personal injuries of which they complained. *Id.*, at 30, 56.

Defendants timely removed the twin cases to the United States District Court for the Eastern District of Virginia, invoking that court's diversity-of-citizenship jurisdiction. See 28 U. S. C. §§1332(a)(1), 1441(a). The notice of removal described Lincoln as a Texas corporation with its principal place of business in Texas, INVESCO as a Delaware corporation with its principal place of business in Georgia, and State of Wisconsin Investment Board as an independent agency of Wisconsin. App. 81. In their con-

solidated federal-court complaint, the Roches identified themselves as citizens of Virginia and Lincoln as a corporation headquartered in Texas, just as they did in their state-court complaints. *Id.*, at 27, 53, 114–115.[2] Further, they stated affirmatively that the federal court "has jurisdiction of this matter." *Id.*, at 114. Lincoln, in its answer to the complaint, admitted that, through its regional offices, "it manages Westfield Village." *Id.*, at 137, 138. Lincoln did not seek to avoid liability by asserting that some other entity was responsible for managing the property.

In both their state- and federal-court complaints, the Roches stated that, "[u]pon further discovery in the case," they would "determine if additional defendant or defendants will be named." *Id.*, at 28, 54, 116. Although they engaged in some discovery concerning Lincoln's affiliates, their efforts in this regard were not extensive, Tr. of Oral Arg. 9, 14, 38–39, 48–49, 53, and at no point did they seek to join any additional defendant.

After discovery, the parties cross-moved for summary judgment. The District Court granted defendants' motion and denied plaintiffs' motion, noting that it would set forth its reasons in a forthcoming memorandum order. App. to Pet. for Cert. 20a–21a. The promised memorandum order issued a few months later, *id.*, at 22a–40a, and the District Court entered final judgment for the defendants the same day, *id.*, at 41a.

Six days after the District Court granted defendants' motion for summary judgment, but before final judgment was entered, the Roches moved to remand the case to the

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[2]Some weeks after the removal, the District Court dismissed INVESCO as a defendant. App. 112. Nothing turns on the presence or absence of INVESCO as a defending party. State of Wisconsin Investment Board, alleged owner of Westfield Village, remains a defendant-petitioner. Its status as a Wisconsin citizen for diversity purposes is not currently contested.

state court, alleging for the first time the absence of federal subject-matter jurisdiction.[3] Specifically, the Roches alleged that Lincoln "is not a Texas Corporation, but a Partnership with one of its partners residing in the Commonwealth of Virginia." App. 226.[4] The District Court denied the remand motion, concluding that Lincoln is a Texas corporation and that removal was proper because the requisite complete diversity existed between all plaintiffs and all defendants. App. to Pet. for Cert. 84a–93a.

The Court of Appeals for the Fourth Circuit reversed and instructed the District Court to remand the case to the state court. 373 F. 3d, at 622. Although recognizing that Lincoln is a Texas citizen and a proper party to the action, *id.*, at 620–621, the Court of Appeals observed that "Lincoln operates under many different structures," *id.*, at 617. Describing Lincoln as "the nominal party and ultimate parent company," the appellate court suspected that an unidentified "Virginia subsidiary, be it a partnership, corporation or otherwise, rather than the Texas parent" was "the real and substantial party in interest." *Id.*, at 620–621. Lincoln, the party invoking federal-court jurisdiction, had not demonstrated the nonexistence of "the

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[3]The Roches state that they preferred to litigate in state court for two principal reasons: Virginia does not permit summary judgment based on affidavits or deposition testimony, and Virginia has not adopted the rule of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), to assess expert evidence. Brief for Respondents 3, and n. 1.

[4]Confusion about Lincoln's structure is understandable. Real estate businesses typically operate through a web of affiliated entities, see Brief for Real Estate Roundtable et al. as *Amici Curiae* 6–13, and certain Lincoln-affiliated responders to the Roches' discovery inquiries stated that Lincoln was a partnership, *e.g.*, App. 175, 176, 179. In response to the Roches' motion to remand, Lincoln proffered its 1979 Texas incorporation papers and an affidavit attesting to its status as a Texas corporation. *Id.*, at 238–246. That matter is no longer debated; at oral argument, counsel for the Roches acknowledged that Lincoln is a Texas corporation. Tr. of Oral Arg. 40–41.

Virginia sub-'partnership,'" the Court of Appeals reasoned, *id.*, at 621, and therefore had not met its burden of establishing diversity, *id.*, at 621–622.

We granted certiorari, 543 U. S. 1186 (2005), to resolve a division among the Circuits on the question whether an entity not named or joined as a defendant can nonetheless be deemed a real party in interest whose presence would destroy diversity. Compare 373 F. 3d, at 620–622, with *Plains Growers, Inc.* v. *Ickes-Braun Glasshouses, Inc.*, 474 F. 2d 250, 252 (CA5 1973) ("The citizenship of one who has an interest in the lawsuit but who has not been made a party . . . by plaintiff cannot be used by plaintiff on a motion to remand to defeat diversity jurisdiction."), and *Simpson* v. *Providence Washington Ins. Group*, 608 F. 2d 1171, 1173–1175 (CA9 1979) (Kennedy, J.) (upholding removal where Alaska plaintiff sued Rhode Island parent company without joining as well potentially liable Alaska subsidiary, and the parties did not act collusively to create diversity jurisdiction).

II

The Court of Appeals correctly identified Lincoln as a proper party to the action, but it erred in insisting that some other entity affiliated with Lincoln should have been joined as a codefendant, and that it was Lincoln's obligation to name that entity and show that its joinder would not destroy diversity.

We stress, first, that, at this stage of the case, the existence of complete diversity between the Roches and Lincoln is not in doubt. The Roches, both citizens of Virginia, acknowledge that Lincoln is indeed a corporation, not a partnership, and that Lincoln is chartered in and has its principal place of business in Texas. Tr. of Oral Arg. 40–41; see App. 114 ("Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters [in] Texas."); 373 F. 3d, at 620. Accordingly, for

jurisdictional purposes, Lincoln is a citizen of Texas and of no other State. 28 U. S. C. §1332(c)(1) ("a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business").

We turn now to the reasons why the Fourth Circuit erred in determining that diversity jurisdiction was not proved by the removing parties. 373 F. 3d, at 612 (concluding that "Defendants failed to carry their burden of proof with respect to their allegedly diverse citizenship"). The principal federal statute governing diversity jurisdiction, 28 U. S. C. §1332, gives federal district courts original jurisdiction of all civil actions "between . . . citizens of different States" where the amount in controversy exceeds $75,000. §1332(a)(1).[5] Since *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806), we have read the statutory formulation "between . . . citizens of different States" to require complete diversity between all plaintiffs and all defendants. *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 68 (1996); cf. *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531 (1967) (explaining that complete diversity is not constitutionally required and upholding interpleader under §1335 based on minimal diversity, *i.e.*, diversity between two or more adverse parties).

While §1332 allows plaintiffs to invoke the federal courts' diversity jurisdiction, §1441 gives defendants a corresponding opportunity. Section 1441(a) states: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is

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[5]The Roches sought damages well in excess of the jurisdictional minimum. App. 40–50, 66–75, 131–134.

pending." The scales are not evenly balanced, however. An in-state plaintiff may invoke diversity jurisdiction, but §1441(b) bars removal on the basis of diversity if any "part[y] in interest properly joined and served as [a] defendan[t] is a citizen of the State in which [the] action is brought."[6] In the instant case, Virginia plaintiffs Christophe and Juanita Roche joined and served no Virginian as a party defendant. Hence the action qualified for the removal defendants effected.

Neither Federal Rule of Civil Procedure 17(a), captioned "Real Party in Interest," nor Federal Rule 19, captioned "Joinder of Persons Needed for Just Adjudication," requires plaintiffs or defendants to name and join any additional parties to this action. Both Rules, we note, address party joinder, not federal-court subject-matter jurisdiction. See Rule 82 ("[The Federal Rules of Civil Procedure] shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."); Advisory Committee's Notes on Fed. Rule Civ. Proc. 19, 28 U. S. C. App., pp. 696–698. Rule 17(a) directs that "[e]very action shall be *prosecuted* in the name of the real party in interest." (Emphasis added.) That Rule, as its text displays, speaks to joinder of *plaintiffs*, not defendants.

Rule 19 provides for the joinder of parties who should or must take part in the litigation to achieve a "[j]ust [a]djudication." See *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 118–123 (1968). The Roches place no reliance on Rule 19 and maintain that the Rule "played no part, explicitly or implicitly, in the Court of Appeals' conclusion." Brief for Respondents 36. Given

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[6] Although we have not addressed the issue, several lower courts have held that the presence of a diverse but in-state defendant in a removed action is a "procedural" defect, not a "jurisdictional" bar, and that the defect is waived if not timely raised by the plaintiff. See 14C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3739, pp. 451–457, and nn. 32–37 (3d ed. 1998).

Lincoln's admission that it managed Westfield Village when mold contaminated the Roches' apartment, see *supra*, at 4, 7, it does indeed appear that no absent person, formally or practically, was "[n]eeded for [j]ust [a]djudication." Fed. Rule Civ. Proc. 19; cf. *Simpson*, 608 F. 2d, at 1174 (diverse corporate defendant accepted full liability for any eventual adverse judgment; nondiverse subsidiary need not be joined as a defendant, although arguably it had joint liability with its parent); 16 J. Moore et al., Moore's Federal Practice §107.14[2][c], p. 107–67 (3d ed. 2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties.").

While Rule 17(a) applies only to joinder of parties who assert claims, the Court of Appeals and the Roches draw from decisions of this Court a jurisdictional "real parties to the controversy" rule applicable in diversity cases to complaining and defending parties alike. See *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458, 462, n. 9 (1980) (citing Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 247–250 (1978)). But no decision called to our attention supports the burden the Court of Appeals placed on a properly joined defendant to negate the existence of a potential codefendant whose presence in the action would destroy diversity.

III

Our decisions employing "real party to the controversy" terminology in describing or explaining who counts and who can be discounted for diversity purposes bear scant resemblance to the action the Roches have commenced. No party here has been "improperly or collusively" named solely to create federal jurisdiction, see 28 U. S. C. §1359 ("A district court shall not have jurisdiction of a civil ac-

tion in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."); *Kramer* v. *Caribbean Mills, Inc.*, 394 U. S. 823, 830 (1969) (assignment for collection only, motivated by desire to make diversity jurisdiction available, falls within the "very core" of §1359); *Little* v. *Giles*, 118 U. S. 596, 600–607 (1886) (where land was purportedly sold to out-of-state farmer but no money or deed changed hands, quiet title action could not be maintained based on farmer's diverse citizenship), nor to defeat it, see *Cheaspeake & Ohio R. Co.* v. *Cockrell*, 232 U. S. 146, 152 (1914) (diverse defendants, upon showing that joinder of nondiverse party was "without right and made in bad faith," may successfully remove the action to federal court).

Nor are the Roches aided by cases in which actions against a state agency have been regarded as suits against the State itself. See, *e.g.*, *State Highway Comm'n of Wyo.* v. *Utah Constr. Co.*, 278 U. S. 194, 199–200 (1929) ("[State] Commission was but the arm or *alter ego* of the State with no funds or ability to respond in damages."). Decisions of this genre are bottomed on this Court's recognition of a State's asserted Eleventh Amendment right not to be haled into federal court. See, *e.g.*, *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 769 (2002).[7] They are not pertinent to suits between private parties.

Unlike cases in which a party was named to satisfy state pleading rules, *e.g.*, *McNutt ex rel. Leggett, Smith, &*

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[7]Similarly inapposite are cases invoking our original jurisdiction in which we have inquired into the capacity in which a sovereign party appears. See, *e.g.*, *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387, 395–396 (1938) (original jurisdiction improper where State was acting as trustee for its citizens); *United States Fidelity & Guaranty Co.* v. *United States ex rel. Kenyon*, 204 U. S. 349, 358 (1907) (original jurisdiction upheld where United States was "a real and not a mere nominal plaintiff").

Lawrence v. *Bland,* 2 How. 9, 14 (1844), or was joined only as designated performer of a ministerial act, *e.g., Walden* v. *Skinner,* 101 U. S. 577, 589 (1880), or otherwise had no control of, impact on, or stake in the controversy, *e.g., Wood* v. *Davis,* 18 How. 467, 469–470 (1856), Lincoln has a vital interest in this case.[8] Indeed, Lincoln accepted responsibility, in the event that the Roches prevailed on the merits of their claims, by admitting that, "[since 1996,] it has managed Westfield Village Apartments." App. 137. A named defendant who admits involvement in the controversy and would be liable to pay a resulting judgment is not "nominal" in any sense except that it is named in the complaint. Cf. *Knapp* v. *Railroad Co.,* 20 Wall. 117, 122 (1874).

In any event, we emphasize, the Fourth Circuit had no warrant in this case to inquire whether some other person might have been joined as an additional or substitute defendant. See *id.,* at 122 (federal courts should not "inquir[e] outside of the case in order to ascertain whether some other person may not have an equitable interest in the cause of action"); *Little,* 118 U. S., at 603 (if named party's interest is real, the fact that other interested parties are not joined "will not affect the jurisdiction of the [federal courts]"); 16 Moore, *supra,* §107.14[2][c], p. 107–67 ("Ordinarily, a court will not interfere with the consequences of a plaintiff's selection in naming parties, unless the plaintiff has impermissibly manufactured diversity or used an unacceptable device to defeat diversity.").

Congress, empowered to prescribe the jurisdiction of the

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[8]The Roches' complaints cast Lincoln as the primary tortfeasor, alleging that Lincoln engaged in "a conscious and predetermined plan" to conceal the hazards of mold from apartment residents. App. 34, 60. Further, the Roches alleged that Lincoln ignored numerous mold-related maintenance requests they "personally" made to Lincoln, *id.,* at 29, 55, inquiries that, if followed up, might have prevented or lessened their injuries.

federal courts, sometimes has specified that a named party's own citizenship does not determine its diverse status. Thus, as a procedural matter, executors, administrators, and guardians "may sue in [their] own name[s] without joining the party for whose benefit the action is brought." Rule 17(a). As to diversity jurisdiction, however, §1332(c)(2) directs that "the legal representative of [a decedent's] estate . . . shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent." Congress has also provided that in direct action suits against insurers to which the insured is not made a party, the "insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business." §1332(c)(1).

But Congress surely has not directed that a corporation, for diversity-of-citizenship purposes, shall be deemed to have acquired the citizenship of all or any of its affiliates. For cases of the kind the Roches have instituted, Congress has provided simply and only this instruction: "[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *Ibid.* The jurisdictional rule governing here is unambiguous and it is not amenable to judicial enlargement. Under §1332(c)(1), Lincoln is a citizen of Texas alone, and under §1441(a) and (b), this case was properly removed.

* * *

The Roches sued the entity they thought responsible for managing their apartment. Lincoln affirmed that it was so responsible. Complete diversity existed. The potential liability of other parties was a matter plaintiffs' counsel might have assiduously explored through discovery de-

vices. It was not incumbent on Lincoln to propose as additional defendants persons the Roches, as masters of their complaint, permissively might have joined.

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.